SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 716

GENERAL TIME CORPORATION,

Petitioner,

—against—

TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN, DONALD D. HARRINGTON, individually, and as Chairman of the INDEPENDENT STOCKHOLDERS' COMMITTEE OF GENERAL TIME CORPORATION and AMERICAN INVESTORS FUND, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, General Time Corporation ("General Time"), prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit entered in Docket No. 32299 on October 23, 1968.

Opinions Below

The opinion of the Court of Appeals and the dissent thereto are not as yet reported, but are printed as Appendix A hereto.

The first opinion of the District Court for the Southern District of New York is reported in 283 F. Supp. 832 (S. D. N. Y. 1968) and is printed as Appendix B hereto. The second opinion of the District Court was oral and is contained in the transcript of proceedings of April 22, 1968. The relevant portions of that transcript are printed as Appendix C hereto.

Jurisdiction

The Judgment of the Court of Appeals affirming the District Court was entered on October 23, 1968 and is printed as Appendix D hereto. The jurisdiction of this Court is invoked under Title 15, U.S.C. §78aa and Title 28, U.S.C. §1254(1).

Questions Presented

General Time brought this action on April 5, 1968 to enjoin respondents' violations of the proxy rules in connection with their attempt to take control of General Time.

On April 19, 1968, in a separate but contemporaneous administrative proceeding, the Securities and Exchange Commission ("SEC") held that respondents, American Investors Fund, Inc. ("Fund") and Talley Industries, Inc. ("Industries"), violated the Investment Company Act of 1940 (the "1940 Act"). (Appendix E).* That violation in-

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* The SEC's determination of a violation was upheld by the Second Circuit, *SEC* v. *Talley Industries, Inc.*, —— F. 2d ——, reported unofficially in CCH Fed. Sec. L. Rep. ¶92,240 (1968), but that Court refused to direct the entry of the relief sought

(*Footnote continued on following page*)

volved a secret coordinated program to acquire General Time stock for the specific purpose of enabling Industries to effectuate the takeover of General Time. (Appendix E).

Respondents' proxy materials, however, had not disclosed to stockholders the facts underlying their unlawful concerted action or the substantial stock interest of Fund in Industries (9%). On the contrary, the proxy materials contained false or misleading disclaimers concerning the unlawful joint conduct of Industries and Fund. Furthermore, those proxy materials were not supplemented to inform stockholders of the SEC's finding of a violation of law.

The opinion of the majority of the Court of Appeals below (in sharp disagreement with the dissent), upheld the sufficiency of respondents' proxy materials, thus raising the following significant questions under the proxy rules:

1. Whether the Court of Appeals has committed error by adopting as a prerequisite for disclosure an unreasonable standard which requires a speculative showing of a "substantial likelihood that the misstatement or omission would have led a stockholder to grant" or "to withhold" a proxy, instead of ordering the disclosure of all facts which "may be material," the standard propounded by the dissent.

2. Whether the Court of Appeals has committed error (a) by accepting the SEC's administrative processing ("clearance") of proxy materials as indicative of their sufficiency in direct contravention of the SEC's own rules and applicable law; and (b) by improperly shifting to one party the burden to correct and supplement false or misleading proxy

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(*Footnote continued from preceding page*)

by the SEC and General Time. See petition for a writ of certiorari in that case, Docket No. 512. That petition and the instant petition are concerned with the scope of disclosures required under federal securities laws.

material disseminated by the other party in a proxy contest.

Statute Involved

The relevant portions of the Securities Exchange Act of 1934, §14, 15 U.S.C. §78n (the "1934 Act") and the Proxy Rules thereunder with respect to false or misleading statements, 17 C.F.R. §240.14a-9 are set forth in Appendix F hereto.

Statement of the Case

A. The Determinations of the SEC and the Court of Appeals That Industries and Fund Violated the 1940 Act.

On March 26, 1968, after a proxy battle for control of General Time had commenced, Industries and Fund filed a belated application with the SEC under §17(d) of the 1940 Act.* They sought thereby either *nunc pro tunc* approval of their joint activities with respect to their prior acquisitions of over 22% of General Time's outstanding stock, or a finding by the SEC of the inapplicability of §17(d). On April 19, 1968, the SEC denied the application, found a violation of §17(d) and held:

> ". . . [W]e think it clear that Industries and AIF [Fund] entered into and carried out a joint arrangement within the meaning of Section 17(d) and Rule 17d-1 to acquire GTC [General Time] stock by concerted action. . . . Here there was not a mere happenstance of simultaneous purchases of the

* Section 17(d) of the 1940 Act and Rule 17d-1 thereunder require investment companies and their statutory affiliates to disclose proposed joint transactions and to seek the prior approval of the SEC *before* engaging in such joint transactions. Thus the Rule 17d-1 application of Industries and Fund should have been filed not later than December 1967 when their joint scheme to take over General Time commenced.

same security by an investment company and its affiliate. On the contrary, at Industries' instigation it and AIF undertook a coordinated program of acquisitions of the GTC stock, through a common broker, MKC [M. Kimelman & Co.], pursuant to discussions between them and agreed mechanics for its execution. Further AIF was aware of Industries' ultimate objective of bringing about a merger and was influenced to purchase GTC shares by this possibility.

"Section 17(d) and Rule 17d-1 therefore were applicable and required that an application regarding the joint arrangement be filed with and granted by us prior to the taking of any action. However, the requisite prior approval was not sought or obtained, and Industries' acquisition of GTC shares pursuant to its joint arrangement was accordingly in violation of the Act." (Appendix E, p. 38a).

The SEC determination of a violation was upheld by the Court of Appeals for the Second Circuit on July 31, 1968, *SEC* v. *Talley Industries, Inc.*, —— F. 2d ——, reported unofficially in CCH Fed. Sec. L. Rep. ¶92,240 (2d Cir. 1968).

B. Proceedings In the Courts Below With Respect to Proxy Materials.

On April 5, 1968, General Time brought this suit in the District Court and alleged, *inter alia*, that respondents failed to disclose in their proxy materials their violations of the 1940 Act and Fund's close relationship with Industries as underscored by Fund's substantial stock holdings in Industries. Indeed, the last proxy statement disseminated by respondents before General Time's annual meeting of April 22, 1968 affirmatively disclaimed Indus-

tries' joint relationship with Fund and their unlawful joint activities:

> "There has never been any claim by Mr. Talley [President of Industries] that there are any arrangements or understandings with American Investors Fund, Inc., or with any other person by or on behalf of Talley Industries, Inc., the Independent Stockholders' Committee or any other participants relating to the giving or withholding of a proxy for the election of directors at the annual meeting of stockholders of General Time Corporation—*and there are none.*" (Insurgents' Proxy Statement of April 5, 1968) (Emphasis supplied).

Those representations are merely illustrative of similar false or misleading statements in respondents' proxy materials. They were clearly designed to represent to General Time stockholders that Industries and Fund were not involved in an arrangement or understanding of any kind with respect to General Time stock. The opposite, however, was, and is, the case, and was so recognized by the SEC in its Order of April 19, 1968 (Appendix E).

Respondents thus placed themselves in a position to take control of General Time in violation of law. Full disclosure was required since the misstatements and omissions concealed unlawful activities directly related to the change of control sought by respondents.

On April 11, 1968 and on April 22, 1968, General Time's motions for preliminary injunctive relief against these violations of the proxy rules were denied by the District

Court and General Time appealed.* The Court of Appeals, Judge Hays dissenting, affirmed on October 23, 1968 (Appendix A).

C. The Decision of The Court of Appeals.

The decision of the Court of Appeals nullifies the protection of stockholders contemplated by the disclosure requirements under the proxy rules. It also fundamentally alters the SEC's administrative role in processing proxy statements, and imposes an unjustified burden on the SEC and private parties in enforcing the protective purposes of the 1934 Act.

According to the majority, before facts need be disclosed, there must be a demonstration of "a substantial likelihood that the misstatement or omission would have led a stockholder to grant" or "to withhold" a proxy, "whereas in the absence of this he would have taken a contrary course." (Appendix A, p. 6a).

The majority's standard requires that courts, rather than stockholders, determine the weight to be given the relevant facts. The unreasonableness of this approach is demonstrated by the majority's own acknowledgement that "no one knows what motivates stockholders in choosing between slates . . . and determination of the influence of a particular omission or even misstatement, is almost sheer guesswork." (Appendix A, p. 6a).

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* That appeal was to be heard on an expedited basis in early May and General Time filed its brief immediately. Before the appeal was to be heard, the SEC brought an action under §17(d) of the 1940 Act against Industries and Fund (see petition for a writ of certiorari, Docket No. 512), and the expedited appeal was deferred, with the consent of all parties, pending the outcome of the SEC's action.

Notwithstanding that acknowledgment, the majority proceeded to speculate that:

> ". . . a statement of Fund's 9% ownership in Industries might have led a stockholder to doubt whether the statement that there were no arrangements or understandings with Fund about the giving of its proxy was the whole truth." (Appendix A, p. 7a).

However, the majority attempted to negate the obvious import of that significant omission in the insurgents' proxy materials by assuming that "proxy statements" are not read "with much precision" and, in any event, "presumably" a stockholder "would have been more likely to give a proxy for the Industries' slate if he had known that an important mutual fund had enough confidence in Industries to own 9% of its stock . . ." (Appendix A, pp. 6a, 7a).

The dissent disagreed with the majority's standard for disclosure and criticized it for "speculating . . . on what kind of information leads readers of proxy statements to decide to act." The dissent, consistent with the purpose of the proxy rules would require the "inclusion of all information which may be material to such decisions". (Appendix A, p. 13a).*

The dissent recognized the practicalities of the situation and cautioned against engaging in rampant speculation as to what moves stockholders to vote:

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* The SEC itself has stated that a §17(d) violation is a material fact which must be disclosed in proxy materials. *Imperial Financial Services, Inc.*, CCH Fed. Sec. L. Rep. ¶77,287 at p. 82,467 (SEC Release No. 7684, August 26, 1965).

> "Surely in the present case the ownership by Fund of 9% of Industries' stock and the determination of the SEC that Industries and Fund were violating Section 17(d) were items of information that the stockholders were entitled to have when their proxies were being sought." (Appendix A, p. 13a).

The majority also misconstrued the SEC's processing procedures under the proxy rules by accepting the SEC's so-called "clearance" of the insurgents' proxy materials as indicative of their sufficiency in disregard of the SEC's Rule 14a-9(b), this Court's statements in *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432-33 (1964), and the Court of Appeals' own holdings to the contrary in other cases.

Furthermore the majority also erroneously determined that General Time's purported "failure to correct alleged misstatements or rectify claimed omissions" manifests their lack of materiality. Thus the majority improperly shifted to General Time the burden of disclosure statutorily imposed upon respondents.

Reasons for Granting the Writ

1. The Court of Appeals' Proxy Disclosure Standard Conflicts With the Broad Remedial Purposes of the Proxy Rules Adopted under the 1934 Act.

This Court has emphasized the importance of full disclosure under the securities laws:

> "A fundamental purpose, common to these statutes, [the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940 and the Investment Advisors Act of 1940] was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963).

And this Court has recognized the applicability of that "fundamental purpose" to proxy materials:

> "The purpose of §14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that '[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.'" *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 431 (1964).

Notwithstanding the clear intent of the 1934 Act, the pronouncements of this Court, and contrary to the standard of disclosure propounded by other federal courts, the

Court of Appeals set forth an unworkable proxy disclosure standard, without citation of authority, which would significantly reduce the free flow of information to stockholders.

The "substantial likelihood" test adopted by the Court of Appeals will cripple the full disclosure requirements of the proxy rules and will frustrate "'the free exercise of the voting rights of stockholders.'" *J. I. Case Co.* v. *Borak, supra* at 431.

An evil that was intended to be remedied by the proxy requirements, according to *Borak,* was to prevent proxies from being "'solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought'" (377 U. S. at 431, citing S. Rep. No. 792, 73d Cong. 2d Sess. 12). The proxy requirements were "intended to 'control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders.'" (377 U. S. at 431, citing H. R. Rep. No. 1383, 73d Cong. 2d Sess. 13).

The proxy rules require that the omitted or misstated fact be relevant to stockholders—obviously something that is of value and not insignificant. It need not be established that the misstatement or omission would have caused stockholders to change their votes. The requirement of the proxy rules is solely that stockholders are entitled to know all facts which may be material to a knowledgeable exercise of their fundamental rights of suffrage. Instead of leaving the decision of the significance to be accorded a specific fact to the reasonable judgment of stockholders, the majority applied an improper standard and imposed its own judgment, thereby superseding the rights of stockholders.

2. The Court of Appeals' Proxy Disclosure Standard Sharply Departs From Decisions in the Second Circuit and of Courts in Other Circuits.

The standard of disclosure adopted by the Court of Appeals is contrary to decisions in other proxy contest cases.

For example, in *SEC* v. *Henwood,* CCH Fed. Sec. L. Rep. ¶91,125 (S. D. Cal. 1961), *mod.* and *aff'd.,* 298 F. 2d 641 (9th Cir.), *cert. denied,* 371 U. S. 814 (1962), the district court stated that all facts "which may influence" votes must be disclosed to stockholders:

> "The statutory mandate is that in a struggle for control of a corporation, both management and the insurgents must be meticulous in disclosing the essential facts which may influence security holders to give or withhold their proxies." (Id. at p. 93,712).

The dissent below adopted the same standard enunciated in the Ninth Circuit, and would require disclosure of all facts that "may be material".

See also *Walpert* v. *Bart,* 280 F. Supp. 1006, 1011 (D. Md.), *aff'd.,* 390 F. 2d 877 (4th Cir. 1968); *Miller* v. *Steinbach,* 268 F. Supp. 255, 273-74 (S.D.N.Y. 1967); *Evans* v. *Armour & Co.,* 241 F. Supp. 705, 709 (E. D. Pa. 1965); *Western Oil Fields, Inc.* v. *McKnab,* 232 F. Supp. 162, 166 (D. Colo. 1964); *Dunn* v. *Decca Records, Inc.,* 120 F. Supp. 1, 2 (S.D.N.Y. 1954); *SEC* v. *Okin,* 58 F. Supp. 20, 24-25 (S.D.N.Y. 1944); *Phillips* v. *The United Corporation,* CCH Fed. Sec. L. Rep. ¶90,395 (S.D.N.Y. 1947), at pp. 91,072-91,073. Compare *Richland* v. *Crandall,* 262

F. Supp. 538, 553 (S.D.N.Y. 1967). See generally 2 Loss, *Securities Regulation,* 917-18 (2d Ed. 1961). *Cf. SEC* v. *Texas Gulf Sulphur Co.,* CCH Fed. Sec. L. Rep. ¶92,215 (2d Cir. 1968), at p. 97,178. ("'The basic test of materiality' . . . is whether a reasonable man would attach importance . . . in determining his choice of action in the transaction in question").

These cases, like the dissent herein, recognize that only stockholders, and not courts, should weigh the effect of relevant facts in a proxy contest. The majority of the Court of Appeals, in contrast, by its "substantial likelihood" standard requires an improper speculative determination that stockholders would switch their votes as a condition to disclosure.*

The broad remedial purposes of the proxy rules to eliminate "deceptive or inadequate disclsoure in proxy solicitation," *J. I. Case Co.* v. *Borak, supra* at 431, cannot be uniformly effectuated when conflicting standards of disclosure are propounded among the circuits. Uniformity and

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* The Court of Appeals has committed further error by establishing a shifting standard of materiality to the detriment of stockholders. The proxy rules require supplementary materials where a proxy statement has become misleading as a result of subsequent developments. Yet the Court ignored that requirement and stated that "this is strong medicine, especially when administered the very day of the stockholders' meeting, and a correspondingly strong showing of materiality is required." (Appendix A, p. 9a) This test applies an improper shifting standard depending on when a particular material fact became misleading and thereby subordinates the paramount rights of stockholders to an accurate and complete disclosure of all material facts to the interests of one participant in a proxy battle.

consistency of administration of the proxy rules are essential. Yet, if the opinion of the majority is permitted to stand unreviewed, the appropriate standards to govern proxy disclosures will vary from circuit to circuit, and district to district, and the guidelines for combatants in proxy contests in drafting proxy materials and for the SEC in processing those materials will remain subject to confusion and doubt.*

3. The Court of Appeals Erroneously Accepted the SEC's Processing of the Insurgents' Proxy Materials as Indicative of Their Sufficiency Contrary to the SEC's Own Rules and Applicable Law.

The majority opinion improperly relied upon the SEC's "clearance" of the insurgents' proxy materials as indicative of their legal sufficiency. That Court overlooked the fact that clearance is merely administrative processing without consideration by the SEC of the legal sufficiency of the preliminary proxy materials being processed.

The SEC's own rules (which were parenthetically disregarded by the Court of Appeals) declare that although proxy materials have been "filed with or examined by" the SEC, that "shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or aproved any statement contained therein . . ." Rule 14a-9(b), 17 C.F.R. §240.14a-9(b). See also, Section 21(e) of the 1934 Act, 15 U.S.C. §78u(e).

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* The majority view that since the Industries-Fund §17(d) application was on file with the SEC "if any GTC [General Time] stockholder wanted more detail, he would know where to get it" (Appendix A, p. 7a) ignores the fact that disclosure to the SEC in a §17(d) application is not disclosure to stockholders under §14 of the 1934 Act. *Cf. Central Foundry Co.* v. *Gondelman,* 166 F. Supp. 429, 446 (S. D. N. Y. 1958).

As stated in *J. I. Case Co.* v. *Borak, supra* at 432:

> "The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it."

The Court of Appeals suggested that the SEC's clearance in this case was meaningful because of the SEC's supposed knowledge of the facts set forth in Industries' and Fund's Rule 17d-1 application.* Yet, in *Subin* v. *Goldsmith,* 224 F. 2d 753, 774 (2d Cir.), *cert. denied,* 350 U.S. 883 (1955), Judge Medina rejected a similar contention:

> "It is claimed that the fact that the Proxy Statement was prepared in consultation with the staff of the SEC, and in full compliance with the SEC Rules and Regulations as interpreted by the staff, is of no moment, as the Commission gave no formal approval nor was any adjudication made as to the sufficiency of the Statement and *we agree that such participation in the preparation of the Proxy Statement by staff members of the SEC as may*

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* Of course, that application contained self-serving exculpatory declarations as to the activities of Industries and Fund. The full facts were not exposed until the SEC's evidentiary hearing was completed on April 18, 1968. The proximity of the SEC determination on April 19, 1968 to the annual meeting is solely attributable to the belated filing by Industries and Fund of their Rule 17d-1 application.

> *have taken place cannot affect the sufficiency as matter of law of the allegations in the complaint.*" (Emphasis supplied).

The approach of the Second Circuit in *Subin* v. *Goldsmith,* was reiterated in *Richland* v. *Crandall,* 353 F. 2d 183 (2d Cir. 1965). Accord, *Millimet* v. *George F. Fuller Co.,* CCH Fed. Sec. L. Rep. ¶91,570 (S.D.N.Y. 1965).

Because of the number of proxy statements examined each year by the SEC (5,000 or so in fiscal 1968) it is vital that this Court clarify the legal significance of the SEC's "clearance" of proxy materials. Otherwise, investors will be led, by opinions such as the one below, to give undue weight to the SEC's processing of proxy materials. Additionally, if SEC clearance is to be given substantive impact, the SEC should be so apprised by this Court so that it can take whatever administrative steps are required to guarantee that it does not approve false or misleading materials.

4. The Court of Appeals Has Improperly Shifted the Burden of Disclosure From the Party Required by Law to Disclose Material Facts.

The majority below misapplied the explicit statutory proxy requirement that "no solicitation be made by means of any proxy statement . . . containing any statement . . . false or misleading . . ." by shifting the burden of disclosure to one party in a proxy contest where the other party omitted or misstated material facts in its proxy materials. The majority regarded it significant that General Time purportedly failed to "correct alleged misstatements or rectify claimed omissions." But information provided by one side in a proxy contest involving the activities of the other side cannot have the same impact

as forthright disclosure by the side involved in those activities. Yet because of that supposed failure to take affirmative action, the complaint by General Time challenging the proxy violations of the insurgents was held to lack substance.

Only the insurgents were aware of all the facts relating to their covert action to take over General Time—those facts were only reluctantly disclosed in the course of the evidentiary hearing before the SEC. The clear duty of the party responsible for the existence of the relevants facts is to disclose those facts to the stockholders. As held by the Second Circuit in *Subin* v. *Goldsmith,* 224 F. 2d 753, 767 (2d Cir. 1955), *cert. denied* 350 U.S. 883 (1955), that duty cannot be imposed on the opposition:

> "The District judge also said that plaintiff if he had inquired would have learned of the omitted material facts. What of it? If defendants had the obligation to insert the omitted matter in the proxy statement, it is no defense that plaintiff might have learned of that fact dehors the statement."

Thus the obligations of full disclosure which one party in a proxy contest must satisfy cannot be avoided by the action or inaction of the other party. This principal was recognized in *Central Foundry Co.* v. *Gondelman,* 166 F. Supp. 429 (S.D.N.Y. 1958):

> "Defendants argue in their brief that the omissions were cured by Management's own material which called attention to Gondelman's role as the principal figure in the Committee. In so urging defendants overlook (i) that the truth or falsity of the oral statements made by the defendants' solicitors is to be determined by reference to the

statements themselves, unaided by Management's efforts to depict the facts; surely an untrue statement made by one and so characterized by another does not render the false statement true; and (ii) Management's endeavor to disseminate the facts was naturally impeded by the false and misleading statements." (*Id.* at 446).*

Conclusion

The majority opinion, by enunciating a "substantial likelihood" change-of-vote test as a prerequisite for disclosure, by relying upon the SEC's so-called "clearance" of proxy materials, by espousing a view that limited disclosure is justified because stockholders do not read proxy materials "with much precision", and by imposing a burden upon one combatant to correct the other side's false and misleading proxy materials, has set forth standards governing proxy disclosures which (a) conflict with the broad remedial purpose of the proxy rules, (b) stultify the philosophy of full disclosure underlying the securities laws in general and the proxy rules in particular, and (c) create an unworkable system which makes it virtually impossible to insure the full and factual disclosure that is consonant with the overriding purpose of the proxy rules.

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* In *SEC* v. *May*, 229 F. 2d 123, 124 (2d Cir. 1956), the Court rejected the notion that proxy disputes "should be viewed in the eyes of the law just as are political contests, with each side free to hurl charges with comparative unrestraint, the assumption being that the opposing side is then at liberty to refute and thus effectively deflate the 'campaign oratory' of its adversary. Such, however, was not the policy of Congress as enacted in the Securities Exchange Act".

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 6, 1968

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 21/22—September Term, 1968.

(Argued September 16, 1968 Decided October 23, 1968).

Docket Nos. 32299/32300

32299

GENERAL TIME CORPORATION,

Plaintiff-Appellant,

—v.—

TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN, DONALD D. HARRINGTON, individually, and as Chairman of the INDEPENDENT STOCKHOLDERS' COMMITTEE OF GENERAL TIME CORPORATION and AMERICAN INVESTORS FUND, INC.,

Defendants-Appellees.

32300

GENERAL TIME CORPORATION,

Plaintiff-Appellant,

—v.—

AMERICAN INVESTORS FUND, INC., TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN and SMITH BARNEY & CO., INCORPORATED,

Defendants-Appellees.

Appendix A

Before:

FRIENDLY, HAYS and FEINBERG,
Circuit Judges.

Appeals from orders of the District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* denying plaintiff's motions for a preliminary injunction restraining the use of proxies allegedly obtained in violation of Rule 14a-9(a) under the Securities Exchange Act of 1934, and from an order of the same court, Frederick v. P. Bryan, *Judge,* dismissing plaintiff's complaint under §17(d) of the Investment Company Act of 1940 and Rule 10b-5 under the Securities Exchange Act of 1934. Affirmed.

LAWRENCE KILL (Chadbourne, Parke, Whiteside & Wolff, New York, N. Y., Paul G. Pennoyer, Jr., John G. Collins, Jerold Oshinsky, of Counsel), *for Plaintiff-Appellant General Time Corporation.*

ROBERT B. FISKE, JR. (Davis Polk & Wardwell, New York, N. Y., Roger L. Zissu, on brief), *for Defendant-Appellee Smith, Barney & Co., Inc.*

CLENDON H. LEE (O'Connor & Farber, New York, N. Y.), *for Defendant-Appellee American Investors Fund, Inc.*

WALTER L. STRATTON (Donovan Leisure Newton & Irvine, New York, N. Y., Sanford M. Litvack, Benjamin Vinar, of Counsel). *for Defendants-Appellees Talley Industries, Inc., Franz G. Talley, M. Kimelman & Co., Michael G. Kimelman and Oscar Kimelman.*

Appendix A

FRIENDLY, *Circuit Judge*:

These appeals are two more chapters in a controversy arising from the efforts of Talley Industries, Inc. (Industries) to displace the management of General Time Corporation (GTC) and ultimately to acquire or merge with it. We have dealt with other aspects of this in *SEC* v. *Talley Industries, Inc.*, decided July 31, 1968, —— F. 2d ——, and will assume familiarity with that opinion.

I.

THE ACTION UNDER THE PROXY RULES

As recounted in our earlier opinion, an "independent Stockholders' Committee" organized by Industries wished to solicit proxies for the election of ten nominees as directors of GTC at its annual meeting on April 22, 1968, but the SEC staff refused clearance unless Industries filed an application for approval of what the staff considered a joint participation for the acquisition of GTC stock by Industries and American Investors Fund, Inc. (Fund) pursuant to Rule 17d-1 under the Investment Company Act of 1940. On March 26 Industries filed such an application, joined in by Fund. The application made a detailed statement of the facts but claimed there was no joint participation within §17(d) of the Investment Company Act. Industries immediately gave GTC a copy of this application. The SEC staff then cleared a proxy statement of the Committee, which was issued under date of March 27.

This Proxy Statement made plain, among other things, that two of the nominees for directors of GTC were officers and directors of Industries; that Industries owned 257,937 shares, or approximately 12.2%, of GTC's stock; that Industries and certain of its officers and directors, as

well as M. Kimelman & Co. and its partners, intended to solicit proxies; that all expenditures for solicitation would be paid by Industries; that Fund owned 210,000 shares (9.89% of GTC's stock; and that Fund had filed a Schedule 14B statement with the SEC but had disclaimed any role in proxy solicitation or any arrangement or understanding with respect to the giving or withholding of a proxy. The Statement placed GTC's stockholders on notice that "Talley Industries, Inc. has announced that its present intention is to propose a merger or other combination of General Time Corporation and Talley Industries, Inc." It recited that GTC had brought suit against Industries, Fund and others "alleging violations by the defendants of provisions of the federal securities laws and seeking to enjoin certain actions, including the voting by the defendants of shares of common stock of General Time Corporation owned by them." It related also that Industries had filed an application with the SEC in which Fund had joined "with respect to an alleged joint participation by Talley Industries, Inc. and the Fund" concerning GTC common stock; that the parties had disclaimed a joint arrangement within the purview of §17(d) of the Investment Company Act; that they had sought dismissal of the application or, in the alternative, approval of the transaction; and that in the application Industries and certain of its directors "have undertaken that they will consider with the staff of the Securities and Exchange Commission reasonable conditions which may be imposed upon their disposition of General Time Common stock."

GTC responded with a second action in the District Court for the Southern District of New York. In this it sought to enjoin the solicitation and use of proxies by the Committee as in violation of Rule 14a-9(a) of Regulation

14 issued under the Securities Exchange Act of 1934.[1] It is common ground that a private action will lie for violation of this rule, *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964), that the corporation has standing to bring such an action, *Studebaker Corp.* v. *Gittlin,* 360 F. 2d 692 (2 Cir. 1966), and that an injunction may issue on a proper showing.

The only criticisms of the Proxy Statement which we deem to require discussion are that it did not adequately disclose the "arrangements" between Industries and Fund, and did not state that Fund owned 9% of Industries' voting shares with the consequence that Industries was an "affiliated person" of Fund under the Investment Company Act.[2]

The standard of materiality is somewhat more elusive in relation to statements issued in a contested election than

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[1] Rule 14a-9. False or Misleading Statements.

> (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

[2] GTC's criticism of the appellation "Independent Stockholders' Committee" is captious. The Proxy Statement made clear that the Committee was acting for Industries; its "independence" was only of the management of GTC. With respect to other criticisms we rest on Judge Tyler's discussion.

in regard to a prospectus or other representation designed to induce the purchase or sale of securities, or a proxy statement seeking approval of a proposed corporate transaction—the situation in *Borak* and in *Alleghany Corp.* v. *Kirby,* 333 F. 2d 327, 345-46 (2 Cir. 1964), *aff'd by an equally divided court in banc,* 340 F. 2d 311 (2 Cir. 1965), cert. dismissed as improvidently granted, 384 U. S. 28 (1966). No one knows just what motivates stockholders in choosing between slates. Those experienced in contested elections are likely to doubt whether proxy statements are read with much precision, and determination of the influence of a particular omission or even misstatement is almost sheer guesswork. The past record of the management, the market performance of the stock, the lustre of the opposition, and the recommendations of brokers and investment advisers based on such considerations, are likely to be much more influential than tired-eye scrutiny of proxy statements. Still, issues of such statements should be held to fair accuracy even in the hurly-burly of election contests.

The test, we suppose, is whether, taking a properly realistic view, there is a substantial likelihood that the misstatement or omission would have led a stockholder to grant a proxy to the solicitor or to withhold one from the other side, whereas in the absence of this he would have taken a contrary course. This latter circumstance—that there is another side—has a bearing on materiality in a case where, as here, the facts have been disclosed to it in ample time for comment. Its failure to correct alleged misstatements or rectify claimed omissions is some evidence that it does not regard them as material—just as a lawyer's failure to object to a jury instruction affords some indication that he did not then regard it as prejudicial, cf. *United States* v. *Kahaner,* 317 F. 2d 459, 478-79 (2 Cir.), *cert. denied,* 375 U. S. 836 (1963).

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We fail to see how the details concerning the discussions between Industries and Fund that were omitted from the proxy statement were "necessary in order to make the statements therein not false or misleading." The Proxy Statement did disclose that something had occurred which the SEC might regard as a joint arrangement although Industries and Fund did not so consider it, and that an application had been filed with the Commission; if any GTC stockholder wanted more detail, he would know where to get it. The claim that GTC stockholders furnished with the facts might have drawn a conclusion of illegality is rather far-fetched, and is further deprived of force by the considerations developed later in this opinion. The failure to mention Fund's 9% ownership of Industries is a shade more troubling since it might be said that recital of this was necessary to overcome an impression of lack of financial relationship between Industries and Fund created by the silence on that score. While the reference to the §17(d) application would appraise the experts of a financial relationship, most stockholders are not in that category. Conceivably also a statement of Fund's 9% ownership in Industries might have led a stockholder to doubt whether the statement that there were no arrangements or understandings with Fund about the giving of its proxy was the whole truth. But even if we assume all this in GTC's favor, we cannot see any real likelihood that a statement of Fund's interest in Industries would have led stockholders to withhold their proxies from the Committee or to grant them to GTC. Rather a stockholder impressed with the desirability of a change in management of GTC and of its merger with Industries would have been more likely to give a proxy for Industries' slate if he had known that an important mutual fund had enough confidence in Industries to own 9% of its stock and thus presumably would support

its efforts. Neither in its letters of March 28 to stockholders nor in any other communication did GTC make any mention of this omission; the point is apparently deemed more important for litigation than it was for information. Finally, although this makeweight is scarcely needed, we think that, despite Rule 14a-9(b),[3] some force can be given to the SEC's clearance of the Proxy Statement in a case such as this where the omissions were of facts well known to it as a result of the contemporaneous Rule 17d-1 application. See *Dunn* v. *Decca Records, Inc.*, 120 F. Supp. 1 (S. D. N. Y. 1954); *Mack* v. *Mishkin*, 172 F. Supp. 885, 888 (S. D. N. Y. 1959); *Kauder* v. *United Board & Carton Corp.*, 199 F. Supp. 420, 423-24 (S. D. N. Y. 1961). Contrast *J. I. Case Co.* v. *Borak, supra*, 377 U. S. at 432-33. We thus conclude that Judge Tyler was right in denying GTC's initial application for an injunction.

On April 22, the day of the stockholders' meeting, GTC brought a further application on for hearing. The crux of this was the SEC's decision of April 19 that Industries had entered into a joint arrangement with Fund concerning acquisition of GTC stock for which approval under Rule 17d-1 ought to have been but had not been secured. GTC claimed that "The fact that the joint arrangement was in violation of law was of overwhelming importance and would have materially crippled the appeal" of the Proxy

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[3] (b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

Statement, and that "At the least . . . this Court should adjourn the Annual Meeting, vacate the proxies obtained by defendants and order a resolicitation based on a complete, truthful and accurate disclosure." Justice Tyler denied this application also.

We assume that Rule 14a-9 may be read as authorizing a court to require a further statement and an opportunity to revoke proxies where a proxy statment, correct at the time of its issuance, has become misleading as a result of subsequent developments, cf. *Central Foundry Co.* v. *Gondelman,* 166 F. Supp. 429 (S. D. N. Y. 1958), although the words of the Rule are not exactly apt to that end. But this is strong medicine, especially when administered the very day of the stockholders' meeting, and a correspondingly strong showing of materiality is required. We find that lacking here. We need not go so far as to say that if the Committee would have been limited to an abject *peccavimus,* this could not have had significant effect—although even on that hypothesis it is hard to see what interest GTC's stockholders would have had in Industries' violation of a statute designed to protect the stockholders of Fund. But the Committee would not have been so confined. It would have been entitled to say that the SEC's decision was one of first impression, see —— F. 2d at ——; that counsel for Industries believed it to be without warrant in law; and that its legality would be tested in the courts. Nine weeks later the Committee could have reported to the stockholders that a United States District Court had ruled that Industries was right. While we reversed that decision on July 31, our opinion rejected any suggestion of deliberate flouting of the Investment Company Act, and that too could have been stated. Under all these circumstances the SEC's holding of a violation was not sufficiently

material to demand a further submission to GTC's stockholders and an adjournment of the annual meeting called for that very day.

II.

The Action Under §17(d) of the Investment Company Act and Rule 10b-5

As noted in our opinion in *SEC* v. *Talley Industries, Inc., supra,* GTC had earlier brought an action in the Southern District of New York complaining of the same violation of §17(d) of the Investment Company Act that was later to constitute the subject of the action by the SEC. The complaint also alleged violation of Rule 10b-5, issued under the Securities Exchange Act of 1934, in that the defendants had purchased GTC stock without disclosing the extent of their associations or their full intentions with respect to merger and the like; stockholders had thereby been induced to part with stock at less than they could ultimately have obtained.[4] Judge Bryan dismissed both portions of the complaint for lack of standing on the part of GTC.

We have no occasion to pass on the correctness of the holding that a company whose shares are being acquired in a transaction for which §17(d) as implemended by Rule 17d-1 requires SEC approval, lacks standing to complain. The relief sought by GTC paralled that requested in the SEC's action in which GTC intervened. Our ruling on the appeal in that case that the court could not properly re-

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[4] While the complaint also alleged failure by Industries to comply with §16(a) of the Securities Exchange Act, this point has not been pressed; the record on appeal from Judge Tyler's order indicates that Industries filed the appropriate report.

quire Industries and Fund to withdraw any votes cast at the stockholders' meeting or enjoin any further voting of such shares is binding on GTC as a party; indeed, in that capacity GTC is now seeking Supreme Court review. Moreover, our views about the proper scope of relief would not be different if we recognized GTC as having standing to sue. Compare *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 473-77 (1940).

Turning to the Rule 10b-5 issue, we would not wish to place our approval on a holding that under no circumstances can an issuer have standing to seek an injunction. There are many practical advantages, well summarized in a note, Private Enforcement under Rule 10b-5,; an Injunction for the Corporate Issuer?, 115 U. Pa. L. Rev. 617, 628-29 (1967), in allowing a corporation in certain cases to enjoin manipulation of its stock, although courts must act both with speed and with caution lest such actions become vehicles for management to thwart purchases in the true interest of the stockholder. While we leave that point open, it may be useful to say that we do not consider *Birnbaum* v. *Newport Steel Corp.,* 193 F. 2d 641 (2 Cir.), cert. denied, 343 U. S. 956 (1952), to have ruled out such a suit despite phrases which, if taken out of context, might seem to support such a view. We nevertheless affirm on the ground that the portion of the complaint relating to Rule 10b-5 was subject to dismissal for failure to state a claim on which relief could be granted.

As indicated above, the gist of the complaint under Rule 10b-5 was that defendants went about the acquisition of GTC stock described in our previous opinion, —— F. 2d at ——, without disclosing their association or Industries' plan for a merger whose terms might be more favorable than the price paid for the stock being acquired. We know

of no rule of law, applicable at the time, that a purchaser of stock, who was not an "insider" and had no fiduciary relation to a prospective seller, had any obligation to reveal circumstances that might raise a seller's demands and thus abort the sale. See Jennings, Insider Trading in Corporate Securities: A Survey of Hazards and Disclosure Obligations under Rule 10b-5, 62 Nw. U. L. Rev. 809, 815 (1968); Bromberg, Securities Law, Fraud, SEC Rule 10b-5, 119, 123-24, 170 (New Matter) (1968). Indeed, secrecy had long been the hallmark of most stock acquisition programs, at least in their initial stages. The very fact that Congress has recently thought it desirable to pass new legislation amending §13 of the Securities Exchange Act to require disclosure under certain circumstances, P. L. 90-439, approved July 29, 1968, 37 U. S. L. W. 9, is an indication that no such obligation previously existed.[5] Cf. *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F. 2d 540, 544 (2 Cir. 1967). Furthermore the complaint, filed after the special bid of February 19 and Industries' subsequent stock buying program, did not allege that further purchases were in con-

[5] The Chairman of the SEC testified at the Senate hearing on the bill that became the new law that "[t]he Commission is of a view that the legislation here proposed will fill a gap, a rather large gap, in the securities statutes." Hearings on S. 510 before the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 15 (1967). In evident agreement the House report on the bill stated that "[a]t present, the law does not even require that [one making a cash tender offer] disclose his identity, the source of his funds, who his associates are, or what he intends to do if he gains control of the corporation," and declared the purpose of the bill to be to remedy the law's "failure to provide adequate disclosure to investors in connection with a cash takeover bid or other acquisitions which may cause a shift in control." H. R. Rep. No. 1711, 90th Cong., 2d Sess. 2, 3 (1968).

templation, and by that time Industries' intentions had been broadcast.

Affirmed.

HAYS, *Circuit Judge* (dissenting):

Instead of speculating as my colleagues of the majority do on what kind of information leads readers of proxy statements to decide to act, I would require the inclusion of all information which may be material to such decisions. Surely in the present case the ownership by Fund of 9% of Industries' stock and the determination of the SEC that Industries and Fund were violating Section 17(d) were items of information that the stockholders were entitled to have when their proxies were being sought.

I would also hold that the complaint in the Rule 10b-5 case was sufficient against a motion to dismiss. The purchasers of GTC stock were under a duty to disclose to the sellers the contemplated merger.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1399

GENERAL TIME CORPORATION,

Plaintiff,

—against—

TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN, DONALD D. HARRINGTON, individually, and as Chairman of the INDEPENDENT STOCKHOLDERS' COMMITTEE OF GENERAL TIME CORPORATION and AMERICAN INVESTORS FUND, INC.,

Defendants.

TALLEY INDUSTRIES, INC.

Defendant and Additional-Party Plaintiff,

—against—

BARTON K. WICKSTRUM and DON G. MITCHELL,

Additional-Party Defendants.

Appendix B

Opinion

Chadbourne, Parke, Whiteside & Wolff,
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for the plaintiff-petitioner.

Donovan, Leisure, Newton & Irvine,
New York City,
Walter L. Stratton, Esq., of Counsel,
for the defendant-respondent.

Tyler, D. J.

The General Time Corporation ("GTC") has petitioned this court for a preliminary injunction pursuant to Rule 65(a), Fed. R. Civ. P., and Section 14 of the Securities and Exchange Act, 15 U. S. C. § 78n (1964), enjoining the defendants,[1] their officers, directors and all others acting on their behalf, from soliciting or voting proxies or shares in connection with GTC's annual stockholders' meeting schedule for April 22, 1968.

This motion was brought on by an order to show cause dated April 5. An evidentiary hearing was held on April 8 and affidavits were submitted at that time.

For reasons to be discussed hereinafter, I conclude that plaintiff has failed to establish that it is reasonably certain to prevail at a plenary trial. Furthermore, any injury that GTC would incur because of a denial of a preliminary injunction would probably be outweighed by the considerable harm that such an injunction would cause to defendants. See, *e.g.*, *Unicon Management Corp.* v. *Kop-*

[1] Defendant Donald Harrington has not been served and he, therefore, is not a party to this motion.

pers Co., 366 F. 2d 199 (2d Cir. 1966); *Studebaker Corp.* v. *Gittlin*, 360 F. 2d 692 (2d Cir. 1966). Accordingly, plaintiff's motion is denied.

The Independent Stockholders' Committee of General Time Corporation ("the Committee") and one of its members and sole financial supporter, Talley Industries, Inc. ("Talley"), appear to be the most important defendants in this suit. The Committee's holdings of GTC stock, including that portion owned by Talley, amount to some 19% of the outstanding voting shares.[2] In its proxy solicitation material, the Committee has proposed ten nominees for positions on the GTC Board of Directors. The proxy contest growing out of this confrontation with the incumbent directors is the subject matter of this litigation.

The first hint of controversy was brought to the attention of the public on February 19, 1968 when Smith, Barney & Co., a Wall Street brokerage firm, announced a special bid for 200,000 shares of GTC. According to the

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[2] An additional 10% of GTC stock is owned by another defendant, American Investors Fund ("the Fund"). Talley and the Committee disclaim in their proxy material any affiliation with or control over the Fund. Because of articles which have appeared in print, however, the Fund has been required to file and has filed a schedule 14(b) statement with the SEC, but it has disclaimed any intention to solicit proxies for the Committee and apparently has refrained from doing so.

Talley has requested that the SEC find it and the Fund are not affiliated within Section 17 of the Investment Company Act, 15 U.S.C. § 80a-17 (1964), or in the alternative, if an affiliation is found, that it be validated by the Commission *nunc pro tunc*. GTC's stockholders have been notified of this pending proceeding in the Committee's solicitation material.

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Dow Jones Broad Tape, the initial reaction of GTC's management was to label the bid "grossly inadequate".[3] That same day, GTC learned from Smith, Barney & Co. that Talley was behind the special bid and an afternoon meeting of GTC and Talley management was hastily arranged.

According to the testimony of Frank Stone, one of plaintiff's attorneys present at the meeting, Franz Talley, President of Talley Industries, represented to GTC management that he and his associates then owned "about a third of the outstanding shares of General Time" and he was interested in effecting a merger between the two companies.

At the advice of counsel, GTC issued a press release that day and sent an open letter to its stockholders the following day, divulging this information and again urging GTC stockholders to reject the special bid. Stone firmly denied that there was any agreement to keep the substance of the conversations at the meeting from becoming public.

Within the next week, Talley and its associates purchased an additional 7% of GTC stock. On February 27, Talley announced in a press release that it then owned

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[3] This and other statements by GTC's management are the subject matter of Talley's counterclaim and third-party claim asserted in the case at bar. Though preliminary relief on these claims was requested by Talley in the papers filed in open court on April 8, proper notice of the claims was not given to plaintiff, issue has yet to be joined and defendant neither brought its request for preliminary relief to the attention of the court nor adduced any evidence in support of such relief. Therefore, it is evident that none of Talley's claims is presently before this court.

about 12% of GTC's stock and that recent purchases of that stock by "others known to Talley" exceeded another 28%. The announcement continued by noting that "these latter shares if taken together with the Talley Industries' interest would total more than 40 per cent of the outstanding stock of General Time." The release also confirmed that Talley was contemplating a merger with GTC.

The February 29th edition of the Wall Street Journal carried an account of the release under the headline, "Talley and Associates Claim 40% Ownership of General Time Stock." The article quoted from the text of the release and stated *inter alia* that Talley "said it and its associates hold more than 40%" of GTC's stock. This story was repeated by Standard & Poor's in its March 8th report.

The record before this court, including various schedule 14(b) statements on file with the SEC and the proxy solicitation material sent out by the Committee, indicates that Talley and its associates on the Committee own 19.3% of GTC's stock. From this, plaintiff submits that either:

(1) The 14(b) statements and the proxy solicitations are false and misleading; or

(2) Some of Talley's associates have failed to file 14(b) statements; or

(3) Talley is guilty of misleading the public by pre-solicitation publicity that it controlled 40% of GTC's stock.

Talley claims that none of these allegations is true, relying on the facts stated in the 14(b) statements and proxy solicitation materials and denying that Talley or anyone acting in its behalf ever asserted that it and its associates owned 40% of GTC's stock.

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Plaintiff has specifically requested that for the purposes of the motion for a preliminary injunction, this court make two findings of fact. Accordingly, I find that there is a reasonable likelihood that Franz Talley made the statement attributed to him concerning the extent of Talley's holdings at the February 19th meeting. On the other hand, I cannot at this time reasonably find that Franz Talley or any of the other defendants is directly responsible for the statement in the February 29th edition of the Wall Street Journal concerning the extent of Talley Industries' control of GTC stock. It seems at least equally likely that the statement was based upon reference to GTC's discussion of Talley control in its February 19th and 20th releases. Further, I infer from the general nature of the February 19th meeting and the absence of any public reference by defendants to that meeting, that Franz Talley's remarks were probably considered by him to be off the record.

With these findings, I turn first to plaintiff's allegation that defendants violated § 14 by publicly disseminating misrepresentations calculated to have a bandwagon effect on other stockholders. On the evidence so far adduced, I cannot find that defendants are guilty of pre-solicitation activities that violate § 14. *Cf. Studebaker Corp.* v. *Gittlin, supra.* The Wall Street Journal article notwithstanding, Talley has never publicly claimed it owned or controlled anything approaching 40% of GTC's stock. As I read its earliest public statement, dated February 27, it does no more than indicate that if a certain, impliedly small group of stockholders known to Talley and owning 28% of GTC's stock was disposed to voting with Talley, then their combined block would constitute over 40% of GTC's stock. In light of the fact that

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GTC made public what apparently was Franz Talley's attempt to privately pressure GTC management with an exaggerated statement of the extent of Talley's control, it seems reasonable that Talley would make this guarded explanation to the public to explain the high percentages and avoid having its own stockholders unduly worry about their own interests.

The case law simply does not support the extraordinary remedy of a preliminary injunction in these circumstances. Franz Talley's private representations to GTC management on February 19 cannot by any stretch of the imagination be deemed to be pre-solicitation activity violative of § 14.

Further, and most importantly, whatever misinformation concerning Talley's ownership of GTC stock was made public, the solicitation materials sent out by the Committee in the March 27 and April 5 mailings amply set out the extent of Talley's holdings and those of the other Committee members. In addition, they fully explain the source of the 40% control figure bandied about in the press.

As in many proxy contests, statements which could not withstand withering cross-examination if made in open court somehow have found their way into the press.[4] Nevertheless, in this case the solicitation material of the defendants has apparently set the record straight. In

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[4] Indeed, the February 27th edition of the Wall Street Journal quotes GTC's President as claiming that GTC's management held between 6 and 7 percent of GTC's stock. The record before this court would seem to indicate that the true figure is closer to 2-3 percent.

particular, I find that defendants' latest mailing of April 5 serves to put the facts in reasonable perspective. The SEC, which has primary jurisdiction in the protection of investors, has screened the Committee's solicitation material and failed to oppose it. This failure is of at least some weight in support of the validity of defendants' activities. See *Kauder* v. *United Board & Carton Corp.*, 199 F. Supp. 420 (S. D. N. Y. 1961).

Finally, as already suggested, there is no showing that the Committee's solicitation materials and 14(b) statements filed in their support are materially untrue or misleading or that any of Talley's associates has failed to file the required statements. Therefore, I cannot say at this time that there is a reasonable likelihood that plaintiff will prevail on this branch of its claim.

As a subsidiary to its foregoing claim, GTC alleges that Talley unlawfully included the stock owned by American Investors Fund in the computation of 40% ownership. See footnote 2, *supra*. As I view the facts on this preliminary showing, Talley has never publicly or privately claimed this. In addition, the Committee has carefully set out its relationship with the Fund in its solicitation materials. Since there was no testimony adduced in this connection at the preliminary hearing and the disputed issues of fact are presently before the SEC in a related matter, no preliminary injunction may be granted on this basis either.

The next claim made by GTC is that defendants' use of the name "Independent Stockholders' Committee of General Time Corporation" is misleading in that:

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(1) The Committee is composed wholly of persons connected with Talley Industries and is, therefore, not independent;

(2) Five of the ten individual members of the Committee are not stockholders of GTC; and

(3) The 14(b) statements and proxy solicitations of defendants fail to describe the terms, conditions and due dates of repayment of loans made to members of the Committee to purchase the bulk of the GTC stock.

No case has held that the use of the word "Independent" in connection with a stockholders' organization is in and of itself violative of § 14. The term apparently is used often in proxy contests without unduly misleading stockholders and this factor was undoubtedly the basis on which the SEC cleared its use in defendants' materials, notwithstanding plaintiff's opposition.

In the one case where a committee incorporating the word into its name was enjoined from using its proxies, the court failed to advert to the use of the word "independent" as the grounds for the relief granted. See *SEC* v. *May*, 134 F. Supp. 247 (S. D. N. Y. 1955), *aff'd*, 229 F. 2d 123 (2d Cir. 1956). Instead, the injunction was granted because the Committee falsely stated that one of its members was acting on behalf of certain named stockholders and a key individual behind the Committee attempted to conceal the nature and extent of his activities because of a previous Securities Act conviction. Misrepresentations of this nature seem wholly absent in this case.

In another case relied upon by the plaintiffs, *Union Pacific R. R.* v. *Chicago & N. W. Ry.*, 226 F. Supp. 400

(N. D. Ill. 1964), the Committee in question did not use the word "independent" in its name. It was enjoined partially on the ground that it was shown to be a mere paper organization, representing only 3/10 of one percent of the corporation's outstanding stock. Of further significance to the court in that case was the fact that a broker's report was distributed as part of the defendants' solicitation activities, although it had not been cleared by the SEC.

While it is true that five of the members of the Committee in the case at bar are not owners of GTC stock, that fact is clearly set out in the defendants' proxy materials. Furthermore, the Committee's various members control a highly significant proportion of GTC's stock and there is no showing that it is a mere paper committee. The Committee is obviously independent of the present management of GTC. Under these circumstances, the use of the term independent in the Committee's name is not misleading.

As for the defendants' failure to be more specific on the loans made to them to purchase the GTC stock, suffice it to say that the data found in the proxy solicitation material and schedule 14(b) statements were sufficient to meet the requirements of the SEC and the data claimed to be missing appears immaterial. Further, there is authority in this circuit which precludes a claim such as this. See *Subin* v. *Goldsmith,* 224 F. 2d 753, 776 (2d Cir. 1955).

The remainder of plaintiff's claims are too insubstantial to merit individual discussion. Undoubtedly, if plaintiff and its management had been given authority to rework defendants' materials in a manner suitable to themselves,

the Committee's finished product would have been altered somewhat. Nevertheless, the materials issued by defendants are sufficiently exhaustive, concise and, so far as the facts have been brought out in the preliminary hearing, true. The "one in a hundred" stockholder who endeavors to read them through will be at least as fairly educated as any other constituent in a similar democratic election.

I am convinced that this proxy contest has been carried on within the guidelines set down by § 14 of the Exchange Act and the SEC Rules. If there were immaterial misstatements attributable to the defendants, there were similar misstatements which can be attributed to the plaintiff. While GTC can make claims about the Committee's solicitation activities which cannot be dismissed as wholly frivolous, the opposite is also apparently true. See footnotes 2 and 4, *supra*. In the final analysis, the parties' proxy material now before the stockholders constitutes a good basis upon which they can make an informed choice. The balance sought by the framers of § 14 would seem to have been achieved.

Yet, if I were to issue a preliminary injunction at this point, only eleven days before the annual stockholders' meeting, its issuance would undoubtedly come to the attention of a large number of GTC stockholders. Regardless of how the parties and the mass media attempted to explain the significance of the order, a substantial number of stockholders would inevitably conclude that GTC's management was thoroughly vindicated and the Committee's name had been blackened by a court of law. Thus, the balance would be drastically shifted in favor of the plaintiff.

Accordingly, I deny plaintiff's application for a preliminary injuction. It is so ordered.

Dated: New York, N. Y.
April 11, 1968.

H. R. Tyler, Jr.
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1399

GENERAL TIME CORPORATION,

Plaintiff,

vs.

TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN, DONALD D. HARRINGTON, individually and as Chairman of the Independent Stockholders Committee of General Time Corporation, and American Investors Fund, Inc.,

Defendant.

TALLEY INDUSTRIES,

Additional Party Plaintiff,

vs.

BARTON K. WICKSTRUM and DON G. MITCHELL,

Additional Party Defendants.

Before:

HON. HAROLD R. TYLER, JR.,

District Judge.

New York, April 22, 1968;
10:00 a.m.

Appendix C

Appearances:

CHADBOURNE, PARKE, WHITESIDE & WOLFF, ESQS., Attorneys for plaintiff and additional party defendants;
Paul Pennoyer, Jr., Esq.,
Lawrence Kill, Esq., and
John Collins, Esq., of Counsel.

DONOVAN, LEISURE, NEWTON & IRVINE, ESQS., Attorneys for defendants and additional party plaintiff;
Walter L. Stratton, Esq.,
David Teitelbaum, Esq., and
Rogert W. Kapp, Esq., of Counsel.

O'CONNOR & FARBER, ESQS., Attorneys for American Investors Fund, Inc.:
Clendon H. Lee, Esq., of Counsel.

The Court: Well, gentlemen, it is now ten minutes past twelve, and I think with some trepidation that the time has come for me to dispose of this motion which came on before me this morning by my acquiescence, which apparently Judge Tenney agreed with, which, of course, is of significance, because he is now presiding in the Civil Motion Part of this Court.

I have executed the show-cause order because of the exigencies of time. It appears Mr. Lee representing American Investors Fund, Inc. did not receive a copy until twenty mintes after ten. Thus he missed the first opening moments of the argument. But I think he has been nice enough to fairly state his position, as have all interested counsel.

Appendix C

I find that this application can be fairly summarized as being a motion for temporary injunctive relief couched in terms of at least by way of background the same facts which were before this Court some weeks ago, several weeks ago now, and which were passed upon in my opinion filed after we had our earlier hearing this month.

Now, of course, the General Time Corporation moves this morning to enjoin Talley from voting its shares this afternoon at the annual meeting at 2:00 o'clock in Stamford, Connecticut, or, in the alternative, adjourning the annual meeting with conditions and subject to directions.

I think it can be fairly stated that this renewed application is based upon what I might style for purposes of articulation as to new considerations, both of which grow out of the fact that for three days last week, culminating on Friday, April 19th, there was a hearing before the Securities and Exchange Commission of the application of Talley, pursuant to Section 17(d) of the Act and Rule 17-d-1.

There is now before this Court this morning the findings and conclusions rendered by the Commission at or shortly after 5:00 p.m. on Friday, April 19, 1968.

As everybody knows, the Commission found that there was an arrangement or understanding as proscribed by Rule 17-d-1 between Talley Industries, Inc. and its agents, on the one hand, and American Investors Fund, or AIF, on the other.

And they, the Commission, refused to give sanction or approval to whatever that arrangement was, as requested by what I will call the Talley Group.

Appendix C

Now, imbedded before that proceeding before the SEC is an additional factor or circumstance which GTC presses upon me today and that is the response of Franz Talley to certain questions put by Mr. Paul Pennoyer, representing GTC at the SEC hearing and having to do with a statement or statements made by Talley to the press just prior to the release by the Wall Street Journal of a story which came out in the February 19, 1968, edition of that newspaper.

That, of course, centers upon the so-called 40 per cent issue, which issue was fully litigated, as I see it before me in the earlier evidentiary hearing and the earlier motion for preliminary injunction by GTC.

I certainly understand GTC, however, on the face of the answer by Mr. Talley, which was somewhat different than I had understood the facts to be before.

However, upon an analysis and comparison of the exhibits which were before me before, once again today I am not totally satisfied that that alleged new issue is anything new at all.

Second of all, I would agree with the GTC position that it could be argued that by inference Talley was implying that others affiliated with him gave rise to a total of 40 per cent of the stock controlled by the Talley Group. I can understand that argument; but, in saying that, I really am left where I was last time, as evidenced in my opinion filed on the earlier motion.

Turning to what I regard as the more substantial issue, I have already said here this morning during the course of argument that the findings and conclusions of the Commission under Section 17 and Rule 17-d-1 issue are at the

very least persuasive so far as this Court is concerned. However, in saying that I conclude that I cannot fairly find and reason and conclude that the situation is markedly different than it was before.

To start out with, Section 14 contemplates what I regard as very different situations than those contemplated by Section 17 of the Act.

I believe that if you read the releases of mailings and advertisements and all those materials which can be fairly construed as proxy material right up to date, they are reasonably fair within the ambit of Section 14.

Of course, it is true that the Talley people—and this, of course, is also true as to GTC—have had no practical opportunity to bring to the attention of all of the stockholders by mailings the findings and conclusions of the Commission on April 19th.

GTC made a valiant effort through the form of its advertisements in the New York Times of yesterday, Sunday, April 21st, and today, April 22nd.

I would agree with Mr. Pennoyer that probably as a practical matter those ads were a little late in the sense that they brought the matter fully to the attention of each individual stockholder.

Nevertheless, I cannot accept all of this as being the firm foundation for a preliminary injunction as prayed for here. I think that an injunction at this hour would create more problems than it would solve.

I also find that I cannot fairly evaluate all the proxy material as being reasonably unfair.

Appendix C

I am most impressed, as I was in my earlier opinion, by two mailings of the Talley people. One is one which went out under the date of March 27, 1968. The full paragraph beginning in the middle of Page 6 of that mailing, I think is a reasonably fair disclosure of the second section 17-d application of the Talley and the Fund.

Of course, it didn't prognosticate that Talley and the Fund would be found in violation of Section 17, but I don't think that anybody under Section 14 could have reasonably insisted that Talley make such a prognostication.

I further find, as I did in my earlier opinion, that the April 5th mailing is reasonably complete under the circumstances then pertaining.

The role of M. Kimelman & Company is fairly well demonstrated, certainly without the precision GTC, or some objecting party which they felt necessary, but I think within the spirit of the proxy rules it was all right.

Now, finally, I am persuaded that any kind of injunction at this hour would be improper, even if it embraced a comprehensive set of provisions designed to protect the status quo, including proscribing any further negotiations, or consultations concerning the Seeburg Corporation proposed merger with GTC.

I also think that adjourning the annual meeting would be obviously expensive, although that might cancel out and, in fact, might be regarded as more of an expense to the corporation than it would be to the Talley interests.

But, in relation to that possibility, it should be said that further delay will only increase pressures and it will only increase opportunities for more problems.

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Therefore, I must conclude that this motion should be and is denied.

Now, gentlemen, I am going to endorse on the back of the motion papers this disposition. I know time is crucial. Every time I have seen you this is so. But it is particularly so now. Time is crucial. And I will see to it, if you like, that this motion paper is filed in case you want to get on to other things.

Mr. Stratton: Judge Tyler, may I address myself to the language of the order to show cause just so that isn't misinterpreted? May I suggest the insertion of the word "may" in the second and third paragraph, so that it cannot be quoted out of context that it does appear that the defendants have violated. So that it appears the defendants may have violated.

The next paragraph would be: "Irreparable loss and damage may result" instead of "will".

The Court: Well, I will buy a revised version of what I suggest. I will show it to you in just a moment.

I think I understand why Mr. Pennoyer put that in, and I think it is fair enough from an adversarial point of view, but I have changed it to an extent.

Now I want to make sure I give the appropriate copies back. I think these belong to you, Mr. Stratton. I think this belongs to you.

And I think this belongs to you, Mr. Pennoyer.

I should emphasize, Mr. Pennoyer, that one of the greatest difficulties I find here is that I do not think Section 14 of the 1934 Act and Section 17 of the Investment Company Act are so closely interrelated.

Appendix C

I recognize that the Imperial case, which you called to my attention, does point out that a violation of Section 17, if not disclosed in a proxy solicitation, would be a violation of 14, and I think that makes sense and I am persuaded by that.

But the difficulty is at this hour and the facts of our case being what they are, where a disclosure was made by Talley that there was this problem and that Talley was making application to see whether or not they could get approval or, in effect, a ruling of no violation of Section 17, having gone out as early as March 27th, I think materially alters the situation here.

Mr. Pennoyer: May I just say that this cliffhanger situation was created by Talley. They should have filed back in December.

The Court: I think that is a fair argument. I am constrained to think in hindsight that that is probably so. But I think saying that doesn't change the result simply because we are here now and hindsight is never a very satisfactory solution.

And also, I can't get around the fact that General Time has had its licks, too, and it must be borne in mind that I was considering today, as I did in my earlier opinion, what GTC has said in its solicitations under the proxy rules as well as what Talley has said in its.

And I think if you put them together and accept the chronology for better or for worse, it would be improvident for me in a Section 14 suit to enjoin this annual meeting today, or to make any such other injunctive relief orders as you here request. And I will be the first to say to you that you on the record or off that that it isn't easy to be sure whether I am right, but that is neither here nor there. We had to face up to it, all of us, and I have done what I can, just as you have yourself.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of October one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

GENERAL TIME CORPORATION,

Plaintiff-Appellant,

v.

TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN and AMERICAN INVESTORS FUND, INC.,

Defendants-Appellees,

DONALD D. HARRINGTON, individually and as Chairman of the Independent Stockholders' Committee of General Time Corporation, and American Investors Fund, Inc.,

Defendants.

Appendix D

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they are hereby affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro
Clerk

APPENDIX E

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

April 19, 1968

In the Matter of

TALLEY INDUSTRIES, INC.
3500 North Greenfield Road
Mesa, Arizona

AMERICAN INVESTORS FUND, INC.
88 Field Point Road
Greenwich, Connecticut
(812-2302)

Investment Company Act of 1940—Section 17(d)

MEMORANDUM OPINION AND ORDER DENYING APPLICATION

American Investors Fund, Inc. ("AIF"), an open-end diversified management investment company registered under the Investment Company Act of 1940 ("Act") and Talley Industries, Inc. ("Industries"), an affiliate of AIF within the meaning of Section 2(a)(3) of the Act,[1] have filed a joint application for an order declaring that certain transactions described in the application including purchases of stock of General Time Corporation ("GTC")

---

[1] Since August 8, 1967, AIF has owned more than 5 percent of the outstanding common stock of Industries.

by them and certain affiliates of Industries are not subject to the provisions of Section 17(d) of the Act and Rule 17d-1 thereunder, or, in the alternative, for an order approving such transactions. After appropriate notice hearings were held at which GTC was granted leave to be heard.

At the conclusion of the applicants' presentation of their evidence in support of the application, the hearing examiner without objection referred the matter to us, and we heard oral argument by applicants and GTC. On the basis of our review we make the following findings.

Section 17(d) of the Act and Rule 17d-1 thereunder prohibit the affiliated person of an investment company, acting as principal, from participating in or effecting any transaction in connection with any joint enterprise or other joint arrangement or profit sharing plan in which any such registered company is a participant unless an application concerning such arrangement has been approved by us. The evidence adduced before the hearing examiner bearing on the issue of whether the transactions in question involved a joint arrangement within the ambit of these provisions detailed the facts surrounding those transactions. It shows that on or about December 29, 1967, Franz G. Talley, president of Industries, telephoned George A. Chestnutt, Jr., president of AIF and of Chestnutt Corporation, AIF's investment adviser, and told him that he was buying GTC stock for Industries and had in mind a possible future merger of Industries and GTC. Talley told Chestnutt that Industries had acquired and would continue to purchase GTC stock, which is listed on the New York Stock Exchange, through the broker-dealer firm of M. Kimelman & Co. ("MKC"), and

asked Chestnutt if AIF would consider buying GTC stock for its investment portfolio. Although AIF's rating of GTC stock was somewhat below the range AIF normally considered desirable for purchase, Chestnutt felt that because of the merger possibility GTC stock had "a very good chance of going up in price" and was attractive. Chestnutt testified that he did not at that time tell Talley whether AIF would purchase any GTC stock but did state that no commitment would be made to Talley with respect to either voting or selling any stock that was purchased. He admitted, however, that he was sure that Talley considered that any GTC stock which AIF might purchase would be "in friendly hands." He acceded to Talley's request that any purchases of GTC stock be made only for AIF and not for other accounts managed by Chestnutt.

At Talley's suggestion Chestnutt met with Michael Kimelman and another partner in MKC on January 3, 1968 to discuss GTC, and the following day Chestnutt decided to purchase the stock for AIF. He then discussed with Talley the advisability of using different brokers to acquire GTC stock but, according to Chestnutt, they realized that if they did so they "might wind up bidding against each other for the same block of stock." On January 5, 1968, AIF placed an order with MKC for the purchase, at times to be determined by MKC in light of market conditions, of 205,000 shares of GTC stock, later increased to 210,000 shares. Between January 5 and February 15, 1968, MKC filled AIF's order, acquiring the 210,000 shares at an average cost of $28.49 per share. Industries acquired a net total of 257,937 shares between December 26, 1967 and February 23, 1968 at an average cost of $36.76 per share, of which 205,837 shares were acquired following completion of AIF's acquisitions and all except 66,437

shares were acquired through MKC. During this period Talley kept Chestnutt advised of how the stock acquisition program of Industries and Talley and his "friends" was progressing.

Under these circumstances, we think it clear that Industries and AIF entered into and carried out a joint arrangement within the meaning of Section 17(d) and Rule 17d-1 to acquire GTC stock by concerted action. The broad language of that Section and Rule indicate that the term "joint arrangement" should not be given a narrow interpretation.[2] Here there was not a mere happenstance of simultaneous purchases of the same security by an investment company and its affiliate. On the contrary, at Industries' instigation it and AIF undertook a coordinated program of acquisitions of the GTC stock, through a common broker, MKC, pursuant to discussions between them and agreed mechanics for its execution. Further AIF was aware of Industries' ultimate objective of bringing about a merger and was influenced to purchase GTC shares by this possibility.

Section 17(d) and Rule 17d-1 therefore were applicable and required that an application regarding the joint arrangement be filed with and granted by us prior to the taking of any action. However, the requisite prior approval was not sought or obtained, and Industries' acquisition of GTC shares pursuant to its joint arrangement was accordingly in violation of the Act.[3]

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[2] *Midwest Technical Development Corporation*, CCH Fed. Sec. L. Rep. Par. 91252 (D. Minn., July 5, 1963).

[3] *Imperial Financial Services, Inc.*, Securities Exchange Act Release No. 7684, pp. 8-10 (August 26, 1965).

We may also note that we have continuing jurisdiction under Section 17(d) and Rule 17d-1 over any future transfers by Industries of the GTC stock it has acquired in violation of these provisions.

Appendix E

We find no warrant for granting retroactive approval of the transactions effected in such violation. The requirement that joint arrangements and transactions by investment companies and affiliates be submitted to us for our examination before any steps are taken to carry them out is an important part of the regulatory structure which is designed to effectuate the provisions, policies and purposes of the Act. One who would ask that we disregard a failure to comply with that requirement has the burden of presenting a compelling showing that such failure was justified and that retroactive approval is not inconsistent with the statutory policies and purposes. We are unable to find that such burden has been satisfied in the present situation.

Accordingly, IT IS ORDERED that the joint application of Talley Industries, Inc. and American Investors Fund, Inc. for an order declaring that certain transactions were not subject to Section 17(d) of the Investment Company Act of 1940 and Rule 17d-1 thereunder, or, in the alternative, granting approval of such transactions, be, and it hereby is, denied.

By the Commission (Commissioners OWENS, BUDGE, WHEAT, and SMITH), Chairman COHEN absent and not participating.

ORVAL L. DUBOIS
Secretary

APPENDIX F

Securities Exchange Act of 1934, Section 14, 15 U.S.C. §78n.

> "It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title."

Rule 14a-9(a), 17 CFR §240.14a-9(a)

> "No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUPREME COURT, U. S.

NOV 18 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 716

GENERAL TIME CORPORATION,

Petitioner,

—against—

TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN, DONALD D. HARRINGTON, individually, and as Chairman of the INDEPENDENT STOCKHOLDERS' COMMITTEE OF GENERAL TIME CORPORATION and AMERICAN INVESTORS FUND, INC.,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT AMERICAN INVESTORS FUND, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLENDON H. LEE
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American Investors Fund, Inc.
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New York, N. Y. 10005

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O'CONNOR & FARBER
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 716

GENERAL TIME CORPORATION,

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—against—

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Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT AMERICAN INVESTORS FUND, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent American Investors Fund, Inc. (the "Fund") opposes the petition for writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered in its Docket No. 32299 on October 23, 1968.

Reasons for Denying the Writ

Respondent Fund believes the opinions below are clear and conclusive as to the application of settled principles of law to the facts in a proceeding involving affirmance of a discretionary denial of a preliminary injunction.

Nowhere in the petition is it suggested that the Fund took any part in the proxy contest which is the subject matter of this case, nor is any participation by the Fund suggested or described in General Time Corporation's ("General Time") other pending petition in Docket No. 512.

Failure to establish, to charge, or even to mention any activity by Fund in the proxy contest appears to be the best proof of the preclusive non-significance of the contentions advanced by petitioner with respect to an extraneous violation of Section 17(d) of the Investment Company Act of 1940. It is as if petitioner were suing on "product liability", where not only did it never buy or use such product, but there was no product at all.

Nevertheless it is the Fund's nature as an investment company which affords petitioner a pretext to plunge the Fund into expensive litigation in this case, as well as in other litigation including Docket No. 512.

The opinion below assumes familiarity with that Court's earlier opinion in *SEC* v. *Talley Industries, Inc.*, decided July 31, 1968 and now reported in 399 F. 2d 396, which is the subject of the petition in Docket No. 512. Both that opinion and the majority opinion herein affirmatively show that there has been no injury to any party including General Time.

The opinions by the Court of Appeals in both cases, as well as the opinions of both District Courts, make clear that petitioner General Time and its present management, who have unfettered access to its corporate treasury for the purpose of financing litigation, are total strangers to the violation of Section 17(d) of the Investment Company Act of 1940 by respondent Talley Industries, Inc. The lucid

opinion in the case sought to be reviewed herein shows, we believe, that petitioner and the dominant individuals who have been voted out of office are simply conducting a furious assault upon a house of cards of their own architecture.

CONCLUSION

For the reasons stated in the opinions below, the petition should be denied.

November 1968

Respectfully submitted,

CLENDON H. LEE
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American Investors Fund, Inc.
120 Broadway
New York, N. Y. 10005

STANLEY L. SABEL
O'CONNOR & FARBER
Of Counsel

SUPREME COURT, U. S.

Office-Supreme Court, U
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 716

GENERAL TIME CORPORATION,

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—against—

TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN, DONALD D. HARRINGTON, individually, and as Chairman of the INDEPENDENT STOCKHOLDERS' COMMITTEE OF GENERAL TIME CORPORATION and AMERICAN INVESTORS FUND, INC.,

Respondents.

BRIEF OF RESPONDENTS TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN AND OSCAR KIMELMAN IN OPPOSITION TO PETITION FOR CERTIORARI

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Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 716

GENERAL TIME CORPORATION,

Petitioner,

—against—

TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN, DONALD D. HARRINGTON, individually, and as Chairman of the INDEPENDENT STOCKHOLDERS' COMMITTEE OF GENERAL TIME CORPORATION and AMERICAN INVESTORS FUND, INC.,

Respondents.

BRIEF OF RESPONDENTS TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN AND OSCAR KIMELMAN IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

The instant action is one of several which have arisen out of an election contest between the management of petitioner, General Time Corporation ("General Time"), and an Independent Stockholders' Committee (the "Com-

mittee") supported by those respondents on whose behalf this Memorandum is submitted.

Proxies were solicited by both factions in March and April 1968, and on April 22, 1968 the General Time stockholders' meeting was convened. On that date, the stockholders' ballots were cast and the meeting was thereupon recessed to permit the inspectors of election to count the vote and prepare their report. By reason of stays issued in other litigation the meeting has not yet been reconvened to continue the transaction of business. Preliminary indications are, however, that the Committee's candidates were elected by a margin of some 97,000 votes. As of this writing, despite the passage of seven/twelfths of the term to which the Committee's slate was apparently elected, management still remains in office.

Petitioner (*i.e.*, management, suing in the name of the corporation) filed its complaint in the United States District Court for the Southern District of New York on April 5, 1968 in the middle of the proxy solicitation campaign. The complaint charged that the Committee's proxy statement, both in what it said and in what it did not say, was false and misleading and violated Rule 14a-9(a) of the Proxy Rules (17 C.F.R. 240.14a-9(a)). Petitioner in the District Court twice moved for, and was twice denied, preliminary injunctive relief. On appeal, the United States Court of Appeals for the Second Circuit specifically found both that the Committee's proxy statement was not false or misleading and that the alleged omissions (which petitioner wants further reviewed in this Court) were not material; and accordingly it affirmed (2-1) the District Court's findings to the same effect.

In reaching its conclusion of immateriality, the Court of Appeals noted that its own view to that effect was reinforced by the fact that, although the additional information had been disclosed to petitioner in ample time, petitioner never made reference to it in its own proxy solicitation literature. The Court of Appeals noted that petitioner's "failure to correct alleged misstatements or rectify claimed omissions is some evidence that it does not regard them as material. . . ." (Pet. Appx. A, at 6a)* As to one such claimed omission, the Court of Appeals noted that "the point is apparently deemed more important for litigation than it was for information." (Pet. Appx. A, at 8a)

Petitioner argues that the Court of Appeals should not have decided what was or was not material but rather should have required inclusion in the Committee's proxy statement of all additional matters that "may be material" (Pet. 12).

Facts

On February 19, 1968, respondent Franz G. Talley ("Talley"), the president of Talley Industries Inc. ("Industries"), met with members of the management of General Time and expressed Industries' desire to negotiate a merger with General Time. Management considered the matter but decided to fight against any such proposal and so informed Talley. Five days later (in a companion case) General Time sued Industries, American Investors

* Refers to the pages in the appendices to the petition for certiorari. References to pages in the petition itself are indicated herein by "Pet. ——".

Fund, Inc. (hereinafter the "Fund," a registered investment company), and others, citing Fund's ownership of more than 5% of Industries' common stock and charging violation, *inter alia,* of § 17(d) of the Investment Company Act of 1940 (hereinafter the "Act"). General Time sought to enjoin Industries, the Fund and the other defendants from voting their stock in General Time.*

Industries' demand for a list of stockholders of General Time was refused and Industries brought suit in the Chancery Court of Delaware. After time-consuming attempts to conduct oral examination on issues which the Chancery Court (and subsequently the Supreme Court of Delaware) ruled were irrelevant, General Time finally defaulted, an order was entered against it and management was forced to deliver a stockholder list to Industries. (One result of these tactics was to give management a two-week lead during which only its proxy material was before the stockholders.)

In March 1968, during the pendency of the stock-list litigation, the Securities and Exchange Commission (the "SEC") commenced an investigation (pursuant to its statutory authority under § 42(a) of the Investment Company Act) into General Time's charges that Industries and the Fund had violated § 17(d) of the Act and the SEC's Rule 17d-1 thereunder. These charges were made on the basis of the following facts:

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* General Time's complaint in that action was dismissed by the District Court. That dismissal was affirmed by the Court of Appeals. (See Pet. Appx. A, at 10a-11a.) General Time has informed the Court of Appeals that it does not intend to petition for certiorari from that dismissal.

On December 29, 1967, Talley telephoned George Chestnutt ("Chestnutt"), President of the Fund and told him that Industries had purchased stock in General Time, that it intended to buy more and that it had in mind the possibility of a future merger with General Time. Talley asked whether Fund might also wish to buy some General Time stock. Chestnutt replied that if the Fund did so, it would maintain its own independence and would make no agreements as to voting, disposition, etc. After further consideration of the matter Chestnutt determined that Fund should take a position in General Time. He was motivated both by study of the company's earnings and by a belief that if Industries sought a merger the stock would rise as a result of that offer or of others it might stimulate. (See *SEC* v. *Talley Indus., Inc.*, 399 F.2d 396, at 399 (2d Cir. 1968), the companion case to which Judge Friendly alluded in the introduction to his opinion.) Fund subsequently did buy 210,000 shares at an average price of $28.49 per share. Industries' 257,937 shares, most of which were acquired after Fund had completed its purchases, were acquired at an average cost of $36.76 per share.

By reason of the Fund's ownership of over 5% (*viz.*, 9%) of Industries' outstanding voting stock, Industries is an "affiliated person" of the Fund. (See § 2(a)3(B) of the Act.) Section 17(d) prohibits an affiliate from effecting any "transaction" in which the registered investment company is a joint or joint and several participant, in contravention of such rules as the SEC should prescribe "for the purpose of limiting or preventing participation by such registered . . . company on a basis different from or less advantageous than" that of the affiliate. Rule 17d-1 re-

quires application to and approval by the SEC of any such proposed transaction prior to its effectuation. The SEC's investigation was into the question of whether the acquisition by Industries and the Fund of their respective holdings in General Time shares constituted a "transaction" in which they jointly or jointly and severally participated, and if so whether the Fund's participation was on a basis "different from or less advantageous than" that of Industries.

During March, Industries organized and sponsored the Independent Stockholders Committee and the Committee submitted its proposed proxy statement to the SEC for clearance. On March 25, Industries' counsel received a conference telephone call from four members of the Commission's staff: Ralph Hocker, the staff member in charge of clearing both sides' proxy solicitation material in the General Time contest; John Dudley, Associate Director of the Division of Corporate Regulation (the division in charge of investment company regulation), who subsequently argued the Commission's case before the Court of Appeals in the companion action referred to above (see 399 F. 2d 396, at 398); Sidney Mendelsohn, the Commission official in charge of the investigation which had been conducted by the SEC; and Richard Bandler, the associate regional administrator in New York City who actually conducted the investigation. The discussion concerned the facts developed by the investigation and the Committee's preliminary proxy statement. The staff of the Commission advised Industries' counsel that the SEC would not clear the Committee's proxy statement unless Industries filed an application with the Commission for approval of what the staff considered a joint transaction under § 17(d) of the Act.

On March 26, Industries did file such an application, which was later joined in by the Fund. The application, as the court below found, "made a detailed statement of the facts" (Pet. Appx. A, at 3a) but disclaimed that the events described therein fell within the ambit of § 17(d) of the Act. The Committee's preliminary proxy statement as originally filed with the Commission was amended to include reference to the application and the Commission then "cleared" the Committee's proxy statement and it was thereupon mailed to the stockholders of General Time. A copy of the application was immediately given to petitioner, General Time.

The issues which evolved in the proxy contest were many which are usual in such matters and some which are not. They included General Time's poor earnings record; management's recently executed long-term employment contracts; Industries' desire to effect a merger, its sponsorship of the Committee and prospective conflict-of-interest problems; management's negligible ownership interest; the individual Committee members' ownership (excluding the three candidates who were members of Industries' Board) of 66 times as many shares of General Time as of Industries; the poor performance of General Time's stock in the marketplace; management's belated increase, in late February, of the dividend rate; management's distrust of the Committee and the Committee's distrust of management; the comparative business credentials of the candidates; and management's last-minute proposed bail-out merger with a juke-box and vending machine company from Illinois (Seeburg Corp.).

On April 5, 1968, petitioner filed its complaint below and immediately moved for preliminary injunctive relief, charg-

ing that the Committee's proxy statement violated Rule 14(a)(9). Its motion was based on a broad array of charges, all found to be without merit by the District Court. (See Judge Tyler's Opinion of April 11, 1968, Pet. Appx. P, at 21a-23a.)

On April 16th, 17th and 18th, hearings on Industries' § 17(d) application were had at the SEC. On April 19th the Commission issued its Memorandum Opinion and Order Denying Application (Pet. Appx. E, at 35a-39a) in which it concluded that the transactions described in Industries' application did fall within the ambit of § 17(d) and that since no application had been filed prior to effectuation of the transaction Industries had violated the Act (Pet. Appx. E, at 38a). Although making no finding as to whether the Fund's participation had been on a basis "different from or less advantageous than" that of Industries—the Commission could hardly have done so in light of the fact that the Fund had obtained its General Time stock at a price about 70% of what Industries paid—the Commission declined to grant retroactive approval.

The following Monday, April 22, 1968, four hours before the annual stockholders' meeting was to commence, petitioner applied again to the District Court for preliminary injunctive relief. Management wanted time to publicize the Commission's decision, and in order to obtain such time again charged that the Committee's proxy statement had been false and misleading, this time because it had not set forth more detail with respect to the § 17(d) application. On the basis of all of the facts before the court, which included voluminous proxy materials, newspaper reports, testimony, etc., Judge Tyler again determined that

the Committee's proxy material had not been false or misleading. Focusing on the reference in the Committee's proxy statement to Industries' § 17(d) application, Judge Tyler noted:

> "Of course, it didn't prognosticate that Talley [Industries] and the Fund would be found in violation of Section 17, but I don't think that anybody under Section 14 could have reasonably insisted that Talley make such a prognostication." (Pet. Appx. C, at 30a)

Judge Tyler declined to issue injunctive relief.

Accordingly, the stockholders' meeting of General Time was duly held that day (April 22nd) and the ballots were cast. The preliminary (unofficial) count indicates a plurality of some 97,000 votes for the Committee's nominees. On May 1st, before the count could be officially announced, the SEC brought suit against Industries and Fund on the basis of its determination that § 17(d) had been violated, seeking, *inter alia*, an order that Industries and Fund withdraw the votes each had cast in favor of the Committee's slate on April 22nd. Proceedings were expedited and plenary trial was had before District Judge Wyatt on May 22 and 23. On June 24, Judge Wyatt ruled that he was not bound by the administrative determination and he, too, concluded, as had Industries, that the events in question did not violate § 17(d). The Court of Appeals reversed and remanded because it deemed itself concluded by the finding of the SEC; but in so doing, the Court of Appeals nonetheless went on to find that § 17(d) had rarely been construed; that no case had ever applied it to a situation such as this; that conscientious counsel could well have believed the Section inapplicable; and that Industries and

Fund could not be regarded as deliberate flouters of the law. Hence it concluded that punitive relief that would disfranchise them was not appropriate; that § 17(d)'s purpose was to protect the stockholders of Fund, not General Time's management's interest in maintaining itself in office, and that the stockholders of the Fund had not yet been hurt although they might be if the parties were deprived of their rights to vote (399 F.2d at 405-06).

In the instant proceeding, petitioner seeks review on certiorari of the denial of its applications for injunctive relief in its Rule 14a-9 case, arguing that the Court of Appeals should not have decided what was or was not material but rather should have required inclusion in the Committee's proxy solicitation literature of additional matters which might have been material. Of the plethora of alleged misrepresentations and omissions charged against the Committee by petitioner below (see, *e.g.*, Pet. Appx. B), there remain only the charges that respondents' proxy materials failed to disclose that Industries had violated § 17(d) of the Investment Company Act and that respondents' proxy materials did not pick up what petitioner had, as early as February 24th, put in its § 17(d) complaint—that Fund owned over 5% of Industries' outstanding stock.

ARGUMENT

I.

The Court Below Correctly Found that the Committee's Proxy Statement Was Not Misleading and Further Correctly Found that the Alleged Omissions Were Not Material.

Rule 14a-9(a)* prohibits the solicitation of proxies by means of a statement containing omissions of material fact necessary in order to make the statements therein not false or misleading. In order to run afoul of Rule 14a-9(a), it is thus necessary (1) that the omitted facts complained of be material *and* (2) that their inclusion be "necessary in order to make the statements therein not false or misleading."

The Court of Appeals correctly concluded—as had the District Court—that the Committee's Proxy Statement was not false or misleading: "We fail to see how the details concerning the discussions between Industries and Fund that were omitted from the proxy statement were 'necessary in order to make the statements therein not false or misleading.'" (Pet. Appx. A, at 7a) Petitioner nowhere disputes the correctness of that determination. The court's unchallenged determination that the proxy statement was not false or misleading is dispositive of the instant case, rendering moot any issue as to whether details not included were or might have been material.

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* The text of Rule 14a-9(a) is set out in Respondent's Appendix hereto. Petitioner's Appendix F contains a printer's error which omits the eight key words.

Turning nevertheless to the question of materiality, petitioner argues that the requirement should be that whatever "may be material" should have been required to be included in the literature sent to the stockholders (Pet. 12) even though neither the Committee nor management (nor, for that matter, the SEC) deemed the additional facts in question below to be worth publication during the contest itself.

How the details of the events above related could have been material to the other stockholders of General Time in the election contest, petitioner does not state. The Committee did not include them, although the court below was of the view that, if the further details had any relevance at all, they would more likely have tended to help the Committee than the petitioner which protests their omission. Petitioner did not include them in its solicitation literature and does not explain why, if they were as important as petitioner now says, it did not publish the facts itself. Petitioner's contention that it did not learn the facts in time, that is, not until they "were only reluctantly disclosed in the course of the evidentiary hearing before the SEC" (Pet. 17), is not true. A "detailed statement of the facts" (see Pet. Appx. A, at 3a) was contained in Industries' application to the SEC, and the court below specifically found that petitioner had knowledge of them (Pet. Appx. A, at 6a).

Despite having chosen to make no reference to the additional information itself, petitioner contends that the court should have granted its application. The appropriate definition of materiality, petitioner argues, would be a definition that included all that "may be material" (Pet. 12). But one does not define a word by modifying

it. That which "is material" is only a part of that which "may be material," for the latter includes not only matter which on final analysis is material, but also matter which on final analysis is not. Petitioner would have the courts abdicate the responsibility which is theirs under Rule 14a-9 (a) to make that final analysis.

A doctrine calling for preliminary injunctive relief to be granted in cases where the moving party could do no more than establish doubtful materiality would be the converse of the existing rule which requires a "clear showing" or a "clear and plain case." *Santos* v. *Bonanno*, 369 F.2d 369, 370 (2d Cir. 1966); *Dunn* v. *Decca Records, Inc.*, 120 F.Supp. 1, 3 (S.D.N.Y. 1954).*

Rule 14a-9(a) does call for the court to make the analysis of materiality and the majority below did make that analysis on the basis of its evaluation of all of the facts.

The standard used below was whether, taking a "properly realistic view," there was a "substantial likelihood" that the omitted fact would have "led" a stockholder to vote one way rather than the other (see Pet. Appx. A, at 6a). The cases cited by petitioner (see Pet. 12-13) do not apply a different test at all, although they vary, from one to the other, in form of expression. Thus, in *Richland* v. *Crandall*, 262 F.Supp. 538 (S.D.N.Y. 1967), the court spoke of facts which "could normally be expected to lead

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* On appeal petitioner has the further burdens of showing that the lower court committed "clear error" when it found that the additional facts were not material (Fed. R. Civ. P. 52(a); *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495-96 (1950); *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960)), and that it abused its discretion when it declined to grant injunctive relief in the circumstances. *Meccano, Ltd.* v. *John Wanamaker*, 253 U.S. 136, 141 (1920).

a reasonable stockholder not to vote in favor of the proposal" (262 F.Supp. at 553) or which "would normally be expected to influence a reasonable stockholder in voting on the proposal" (*ibid.*). In *Western Oil Fields, Inc.* v. *McKnab,* 232 F.Supp. 163 (D. Colo. 1964), the court spoke of facts which "reasonably could have influenced, shareholders to give their proxy in a situation where they would not have done so had the alleged fraudulent statement or statements not been made" (232 F.Supp. at 166). Many of the authorities petitioner cites contain the requirement that the additional facts "would influence," unqualified by such phrases as "substantial likelihood," "could normally be expected" or "reasonably could," and those cases could therefore be viewed as requiring a stronger showing of materiality than the test applied below. *Walpert* v. *Bart,* 280 F. Supp. 1006, 1011 (D. Md. 1967), *aff'd,* 390 F.2d 877 (4th Cir. 1968); *Miller* v. *Steinbach,* 268 F.Supp. 255, 273-74 (S.D. N.Y. 1967); *Evans* v. *Armour & Co.,* 241 F.Supp. 705, 709 (E.D. Pa. 1965); *Phillips* v. *United Corp.,* CCH Fed. Sec. L. Rep. ¶90,395, p. 91,072 (S.D.N.Y. 1947); 2 Loss, Securities Regulation 917-18 (2d ed. 1961); *cf. Dunn* v. *Decca Records, Inc.,* 120 F.Supp. 1, 2 (S.D.N.Y. 1954); *SEC* v. *Okin,* 58 F.Supp. 20, 24 (S.D.N.Y. 1944). In *SEC* v. *Henwood,* CCH Fed.Sec.L. Rep. ¶91,125 (S.D. Cal. 1961), *mod. and aff'd,* 298 F.2d 641 (9th Cir.), *cert. denied,* 371 U.S. 814 (1962), the court spoke of "essential facts which may influence." *Id.* at p. 93,712.

But these different means of expression do not express different concepts, and petitioner's argument is a quibble over words where meanings do not differ. In any given case the issue is really whether equity requires judicial intervention, and both courts below have found that the facts at bar did not warrant injunctive relief.

II.

The Court of Appeals' Passing Reference to the SEC's Lack of Objection to the § 17(d) Aspects of the Committee's Proxy Statement Was Not Erroneous "Reliance."

Petitioner asserts that the Court of Appeals "relied upon" the SEC's clearance of the Committee's proxy materials and that this was error warranting reversal (Pet. 14). Far from relying on the Commission's position, the Court of Appeals made its own determination that the additional information was immaterial. The court then wrote that "Finally, although this makeweight is scarcely needed, we think that, despite Rule 14a-9(b), some force can be given to the SEC's clearance of the Proxy Statement in a case such as this where the omissions were of facts well known to it as a result of the contemporaneous Rule 17d-1 application." (Pet. Appx. A, at 8a)

Actually, not only were the facts well known to the SEC by reasons of Industries' § 17(d) application (which the court below described as containing a "detailed statement of the facts" (Pet. Appx. A, at 3a)), but also by reason of the SEC investigation into the matter in early March which had led to the conference telephone call (referred to *supra*, p. 6) wherein both the SEC official responsible for clearing both sides' proxy solicitation materials and the SEC officials in charge of investigation and enforcement of § 17(d) matters participated. For the Court of Appeals to have completely ignored these circumstances would have been unrealistic.

The court's conclusion that the SEC's consideration of the Committee's Proxy Statement was of some significance

does not conflict with this Court's opinion in *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964). In *Borak,* the question was whether or not a private right of action should be allowed to enforce the Proxy Rules as a supplement to the Commission's responsibility for enforcement of those Rules. In that case, this Court was guided by the SEC's report (as *amicus curiae*) that, in view of the great number of proxy statements which confront it, the SEC must ordinarily take factual representations contained therein at face value. For that reason (among others), this Court held that "Private enforcement of the proxy rules provides a necessary supplement to Commission action." 377 U.S. at 432. But as this Court further noted, the SEC's disavowal of responsibility for knowledge was qualified, *i.e.,* facts were accepted by the Commission at their face value "unless contrary to other material on file with it," 377 U.S. at 432. We do not suggest that because the Commission had "other material" (to say the least) "on file with it" relating to the § 17(d) matter, the Commission's failure to object to the Committee's Proxy Statement is determinative. See *Subin* v. *Goldsmith,* 224 F.2d 753, 774 (2d Cir.), *cert. denied,* 350 U.S. 883 (1955) and *Millimet* v. *George F. Fuller Co.,* CCH.Fed.Sec.L.Rep. ¶91,570 (S.D.N.Y. 1965). But it would be absurd not to give "some force" to this "makeweight" (as it was referred to below, see Pet. Appx. A, at 8a). See *Kauder* v. *United Bd. & Carton Corp.,* 199 F.Supp. 420, 423-24 (S.D.N.Y. 1961); *Dunn* v. *Decca Records, Inc.,* 120 F.Supp. 1, 2 (S.D.N.Y. 1954). See also *Sherman* v. *Posner,* 266 F.Supp. 871, 874 (S.D.N.Y. 1966); *Mack* v. *Mishkin,* 172 F.Supp. 885, 888 (S.D.N.Y. 1959); *Shvetz* v. *Industrial Rayon Corp.,* 212 F.Supp. 308 (S.D.N.Y. 1960).

III.

There Was No Shifting of Any "Burden of Disclosure" by the Court Below.

Petitioner alleges that the Court of Appeals improperly "shifted" to it the "burden of disclosure" of facts that petitioner claims should have been disclosed by the Committee (Pet. 16-18). Petitioner's reference is to the Court of Appeals' reasoning that the failure of petitioner in its own proxy materials at any time to correct what it now claims were misleading statements or omissions is "some evidence" that petitioner did "not regard them as material" (Pet. Appx. A, at 6a). This was no "shifting" by the Court of Appeals of any burden of disclosure onto petitioner, but instead merely the drawing of an inference plainly suggested by petitioner's course of conduct.

Petitioner seeks to escape the implication of its own nonaction by the oblique statement that it did not know "all the facts" until later (Pet. 17). This argument is specious. In addition to whatever information petitioner had when it filed its own § 17(d) complaint on February 24th, petitioner had in its possession from first to last in the proxy contest—that is, from the day the Committee's proxy statement first went out (March 27) through all the period of subsequent mailings by both sides in the ensuing 3½ weeks —a copy of Industries' § 17(d) application, a document which, the Court of Appeals found, contained "a detailed statement of the facts" (Pet. Appx. A, at 3a). Yet during this entire period petitioner mentioned none of these facts. Its belated protest evidences, as the Court of Appeals found, management's belief that the issue is "apparently deemed more important for litigation than it was for information" (Pet. Appx. A, at 8a).

CONCLUSION

Wherefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

CONCLUSION

Wherefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

SEC Rule 14a-9(a), 17 C.F.R. 240.14a-9(a)

False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

JAN 7 1969
JOHN F. DAVIS, CLERK

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Respondents.

REPLY BRIEF OF PETITIONER GENERAL TIME CORPORATION

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REPLY BRIEF OF PETITIONER GENERAL TIME CORPORATION

I

In light of the statements by General Time Corporation ("General Time") at pages 3, 5 and 6 of its petition, asserting the false and misleading nature of respondents' proxy material, it is difficult to understand the contention by respondent Talley Industries, Inc. ("Industries") that "Petitioner nowhere disputes the correctness of * * * [t]he court's * * * determination that the proxy statement was

not false or misleading * * *" (Industries' brief, p. 11). We had thought this was what the case was all about: that the principal error below was the adoption of an erroneous and unworkable standard for determining the materiality of information omitted or misstated in proxy solicitation statements. That standard led the Court below to accept as adequate under SEC Rule 14a-9 a proxy statement which concededly:

> (1) Did not disclose to stockholders of General Time the coordinated and secret purchases by Industries and respondent American Investors Fund, Inc. ("Fund") of General Time stock through a common broker, and their close day-to-day working relationships, all of which enabled Industries to mount its proxy battle.
>
> (2) Did not disclose to stockholders that Fund owned almost 10% of the outstanding stock of Industries, while also holding almost 10% of the outstanding stock of General Time. Its holdings of General Time stock resulted from acquisitions pursuant to an unlawful joint arrangement with Industries in violation of the Investment Company Act of 1940.
>
> (3) Affirmatively stated that there were no "arrangements or understandings" between Industries and Fund with respect to General Time stock contrary to facts and relationships going back as far as December 1967 (the existence of which was confirmed by the Securities and Exchange Commission in its Memorandum Opinion and Order of April 19, 1968; Appendix E to petition).
>
> (4) Did not disclose respondents' violation of the Investment Company Act of 1940, although that violation involved unlawful acquisitions of General

Time stock for the basic purpose of enabling Industries to take over General Time.

Under the erroneous standard adopted below, these omissions and misstatements were brushed aside, although as Circuit Judge Hays recognized in dissent, and common sense would affirm, they "were items of information that the stockholders [of General Time] were entitled to have when their proxies were being sought." (Appendix A to petition, p. 13a).

The foregoing information was relevant and material and injunctive relief was appropriate in these circumstances. This is now even clearer as a result of a decision handed down by the Seventh Circuit since this petition was filed on November 6, 1968. *Mills* v. *The Electric Autolite Company,* decided November 25, 1968, — F. 2d — (7th Cir. 1968), unofficially reported in CCH Sec. L. Rep. ¶92,306. *Mills, supra* is consistent with the proxy disclosure standard of the Eighth Circuit,* the Ninth Circuit** and represents further authority that directly conflicts with the standard adopted by the Court below.

In *Mills, supra,* the Court was concerned with the failure to disclose relationships similar to those existing in

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* See *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783 (8th Cir. 1967), where the Eighth Circuit held (at 798) that the proxy rules require "full, fair and complete disclosure * * * [so that in] this struggle for corporate dominance or control, a meaningful choice should be presented to the security holder, who is in turn fully armed with a complete and fair disclosure of all relevant information pertaining to the exercise of his corporate suffrage."

** See *SEC* v. *Henwood,* CCH Fed. Sec. L. Rep. ¶91,125 (S. D. Cal. 1961), *mod. and aff'd.,* 298 F. 2d 641 (9th Cir.), *cert. denied,* 371 U. S. 814 (1962).

the instant case.* In affirming a "key finding" in the case, the Seventh Circuit explicitly recognized the paramount right of stockholders to the full disclosure of relevant information so that they might judge for themselves the effect of such information. Like Judge Hays, the Seventh Circuit found it unnecessary to speculate about the outcome of the mental processes of the stockholders in order to determine materiality. As the court said (CCH Fed. Sec. L. Rep. ¶92,306 at p. 97,451):

> "'These misleading statements and omissions were material in the sense that an average prudent investor ought to be informed of those relationships, in order to bring his own informed and independent judgment to the question of how much weight to give [statements made in proxy material] . . .'"

The *Mills* case is also instructive on the question of appropriate relief in the circumstances here. There the Seventh Circuit, after concluding "in agreement with the district court, that as a matter of law the proxy statement" violated the proxy rules, pointed out "that, if an injunction had been timely sought in advance of the shareholders' meeting for which the proxies were solicited, corrective measures would have been appropriate." *Mills, supra*, at p. 97,453.

Here General Time had sought injunctive relief on two separate occasions prior to its annual meeting of stockholders. Each time that relief was denied on the basis of the restrictive standard approved below—a standard all the more anomalous in denying materiality to information

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* Indeed, the instant case goes beyond the facts of *Mills*, since here, unlike *Mills*, the relationships and the course of conduct between Industries and Fund prior to and during the solicitation of proxies were themselves violative of law.

which was material enough to constitute a violation of law.

At a minimum this Court should review the instant case to resolve the conflict between the disclosure standard of the Court below and that of the Seventh, Eighth and Ninth Circuits. The confusion that now exists can only affect adversely the interest of stockholders in the free-flow of information.

II

Both the Court below and Industries have also erroneously relied upon *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432-33 (1964), to support the contention that "some force" may be given to SEC clearance of proxy material:

> ". . . despite Rule 14a-9(b), some force can be given to the the SEC's clearance of the Proxy Statement in a case such as this where the omissions were of facts well known to it [SEC] as a result of the contemporaneous Rule 17d-1 application." (Appendix A to Petition, p. 8a; Industries' brief, p. 15)

The Court and Industries each disregarded the fact that the SEC adopted Rule 14a-9(b) on January 7, 1966, well after *J. I. Case Co.* v. *Borak* had been decided.* The language of the Rule itself could not be clearer:

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* As a matter of fact, the Court below and Industries misconstrued this Court's holding in *J. I. Case Co.* v. *Borak*, *supra*, that the SEC accepts at "face value" representations in proxy material "unless contrary to other material on file with it" (Id. at 432-33). The Court's reliance upon Industries' Rule 17d-1 application was improper since that application was not even filed with the SEC until after the proxy contest was underway, and was not contrary to respondents' proxy material. The reality was that both respondents' appplication and their proxy material contained the same self-serving, but false, disclaimers as to any arrangements with respect to General Time stock.

"(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made."*

III

The Court below contravened the requirements of the proxy rules by giving evidential weight to the purported nonaction of General Time to excuse the nondisclosures of respondents, thus placing a proxy contestant in a substantial dilemma: it must either disseminate information that is possibly incomplete or even erroneous because it is not within its own personal knowledge, or risk forfeiting its rights to challenge the inadequacy of the other side's proxy materials.

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* At the time of its adoption, the SEC made clear the purpose of Rule 14a-9(b):

"Rule 14a-9 (17 CFR 240.14a-9). This rule, which relates to false or misleading statements in proxy solicitations, has been amended to state specifically that the filing of proxy material with the Commission or the examination of such material by the Commission is not to be deemed a finding by the Commission that such material is accurate or complete or not false or misleading or that the Commission has passed upon the merits of the statements contained therein or any matter to be acted upon by security holders. Representations to the contrary are prohibited. The purpose of the new requirement is to forestall representations that the Commission by its review and 'clearing' of proxy material has approved the material or the proposals contained therein. The new provision merely makes explicit the Commission's long-standing construction of the proxy rules." 31 F.R. 211, January 7, 1966.

General Time had available during the course of the proxy contest only Industries' self-serving Rule 17d-1 application to the SEC. General Time certainly should not have been required, at its peril, to make contrary statements to its stockholders based primarily on its belief and speculation as to what were the true facts.

Indeed, when established facts first became available to General Time by reason of the SEC's findings and formal determination on Friday, April 19, 1968 at 5:00 P.M., General Time immediately made extensive efforts (e.g., by newspaper advertisements) to disseminate information with respect to respondents' violation of law.* By contrast, Industries made no attempt whatsoever, even after the SEC determination, to bring the violation or underlying facts to the attention of General Time stockholders.**

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* General Time's efforts were to no avail as it was too late to mail proxy soliciting materials to stockholders (and, of course, to receive any returns thereon) which would have enabled stockholders to vote or revoke their proxies. The difficulties of contacting the stockholders entitled to vote is manifest by the fact that substantial amounts of General Time stock were held in "street name" by brokers. Clearly, beneficial owners could not have been made aware of the violation in time to cast votes through their brokers in time for the annual meeting.

** All problems relating to the proximity of the SEC's determination on April 19th to General Time's annual meeting on Monday April 22nd resulted solely from respondents' unjustifiedly belated filing of their Rule 17d-1 application.

The petition of General Time for a writ of certiorari should be granted.

Respectfully submitted,

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